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In The

Supreme Court of the United States

October Term, 1988

In Re:

THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

-against-

ELIZABETH DOVYDENAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Over a year after having become a "born-again Christian," respondent, a healthy, college-educated, 34-year-old heiress living at home with her husband and children, made a series of gifts to petitioner, a fundamentalist and evangelical religious community. The gifts were made over a twelve month period and totaled $6,581,356.25. When family members learned about these gifts they tricked her into visiting her parents' home where she underwent intensive professional "deprogramming." Emerging from this treatment with a deep animus against her former church, respondent sought to rescind all of her gifts alleging undue influence. A bankruptcy court judge allowed complete rescission, thereby shattering the life of petitioner's religious community.

Ultimately, the court of appeals partially reversed the judgment, including a $1 million gift made in December of 1984. But the court upheld rescission of respondent's major donation: a $5 million gift conceived of in March 1985, executed in May, and used for the very projects she determined. This gift was conceded to be religiously motivated, but the court referred to some "secular" statements by petitioner that warranted a finding of undue influence, because without them the gift "may not" have been made.

THE QUESTIONS PRESENTED ARE WHETHER petitioner's first amendment rights to teach and instruct, and to solicit and receive donations are violated

I. by the court's reliance on assertedly non-religious statements or conduct as a basis for rescission of a religiously motivated gift without an unequivocal finding that *but for* those non-religious factors the gift would not have been made?

II. by the court's retrospective characterization of statements and conduct as "secular" that, at the time they occurred, the parties involved understood to have a substantial religious dimension?

III. by the court's failure to make an independent judgment on the whole record as to whether rescission of respondent's $5 million gift impermissibly interfered with the petitioner's first amendment rights, contrary to this Court's decision in *Bose Corp. v. Consumers Union of the United States,* 466 U. S. 480 (1985)?

IV. by the court's failure to require clear and convincing proof of the existence of undue influence?*

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* **Rule 28.1 Listing.** There are no parents, subsidiaries, or affiliates of petitioner The Bible Speaks, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner The Bible Speaks, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on March 9, 1989.

OPINIONS BELOW

The opinion and order of the bankruptcy court allowing respondent's claim of $6,581,356.25 against petitioner (Appendix C pp. 84a - 134a) are unofficially reported as *In Re The Bible Speaks*, 73 B. R. 848 (Bankr. D. Mass. 1987). The memorandum opinion and order of the district court affirming that order (Appendix B pp. 48a - 83a) are officially reported as *The Bible Speaks v. Dovydenas*, 81 B.R. 750 (D. Mass. 1988). The opinion and judgment of the court of appeals affirming in part and reversing in part (Appendix A pp. 1a - 47a) is reported as *In Re The Bible Speaks*, 869 F.2d 628 (1st Cir. 1989).

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1989. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The first amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

In relevant part, the fourteenth amendment provides that:

> Section 1. ... nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition arises out of a series of gifts made by respondent during a twelve month period between December of 1984 and December of 1985. The gifts were made to petitioner The Bible Speaks, Inc., a fundamentalist and evangelical religious community centered in Lenox, Massachusetts. Respondent first became acquainted with The Bible Speaks in 1982, when she and her husband moved to Lenox. During 1983 and 1984, respondent became increasingly absorbed in the community's spiritual and social life, becoming a devout "born-again Christian." *In Re The Bible Speaks,* 869 F.2d 628, 631-32 (1st Cir. 1989); A. pp. 8a - 14a. There is no dispute that when she made her gifts, respondent was a physically healthy, intelligent, college educated, 34 year old woman who at all times lived at home with her family, took care of her children, and travelled freely.

Petitioner's gifts were as follows: (1) a $1 million gift completed in December of 1984; (2) a $5 million gift initially conceived of in March of 1985, and completed in May of 1985; (3) several small gifts totalling $80,000 made between July and November of 1985; and (4) a final $500,000 gift completed in December of 1985. 869 F.2d at 633-40; A. pp. 14a - 31a. Respondent's family finally tricked her into leaving Lenox, and then subjected her to intensive professional "anti-cult" deprogramming.[1] The end result was that the once devout and

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[1] As a result of a pretext respondent was misled into going to Minnesota 869 F. 2d at 640; A. pp. 31a - 33a. The evidence is undisputed that when she arrived, she was kept there in a specially rented house for six days

happy member of the church became an implacable enemy,[2] and respondent sought to rescind all of her gifts.

A. Procedural History

After abortive proceedings in the state court, the church sought shelter in bankruptcy. The bankruptcy judge sustained respondent's claim as a creditor, holding that all her gifts had resulted from undue influence exercised by or through the church's leader, Pastor Stevens. *In re The Bible Speaks,* 73 B. R. 848 (Bankr. D. Mass. 1987). The church appealed to the district court under 28 U. S. C. § 158 (a). That court "accept[ed] and adopt[ed] in full" the bankruptcy judge's findings of fact, and concluded that his decision was not "clearly erroneous." *The Bible Speaks v. Dovydenas,* 81 B. R. 750, 761 (D. Mass. 1988); A. pp. 48a, 83a.

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in the company of her family but without her children. For hour upon hour professional "anti-cult deprogrammers" exposed her to videos of various purported "cults" and totalist groups, including the Mormon Church, the Unification Church, the Hare Krishnas and the Rajneesh. Joint Appendix filed with the Court of Appeals, herein after "J.A.," Vol. I, pp. 571 - 72; J. A. Vol. II pp. 1223. After the six days with her family, Mrs. Dovydenas then entered a half way house called Unbound, Inc. in Iowa for yet another two to three weeks (J. A. Vol. IV, p. 2528), where she was exposed to "scripture twisting" and "miracle" debunking. J. A. Vol. VI, pp. 3320-30. Upon leaving Unbound, Inc., she returned to her parents' house in Minnesota and stayed there for another month.

2 Respondent developed intense hostile feelings against The Bible Speaks. J. A. Vol. II, p. 922. Both Dr. Gersh, a psychologist, and Dr. Varner, a psychiatrist, recognized that her "major motivation is to expose The Bible Speaks - - for what it is." *Id.* at 914; J. A. Vol. VII, p. 4296. At trial, respondent testified that she was "very angry about what people did to me" [at The Bible Speaks] (J. A. Vol. II, p. 1236) and she decried the "disgusting and humiliating treatment" that she had received. *id.* at 1290.

The court of appeals affirmed the judgment in part and reversed in part. The court held that rescission had been improperly allowed with respect to both the initial $1 million gift made in December of 1984, and the several smaller gifts totalling $80,000 made between July and November of 1985. But the court affirmed with respect to the intervening $5 million gift, and respondent's final gift of $500,000. *In Re The Bible Speaks*, 869 F. 2d 628 (1st Cir. 1989), A. pp. 1a - 47a.

Petitioner does not seek review of the finding with respect to the final gift of $500,000.[3] But with respect to the $5 million gift, petitioner submits here, as it did in the court below, that *even assuming all the findings of fact accepted by the court below were true*, rescission unconstitutionally burdens the rights of religious communities to teach their own special beliefs and to solicit, receive and use gifts.

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[3] The record would show that respondent became even more deeply immersed in the church, partly as a result of her husband's absences and alienation from her family resulting from her family's interference in her gift-giving. But in terms of this Court's jurisdiction, the final gift is far too deeply fact-bound and case-specific to present petitioner's constitutional claims in clear focus. Nor is recovery of that gift necessary for petitioner to re-establish itself as a viable religious community.

B. The Opinion of the Court of Appeals

1. The legal standards. The court of appeals stated that the standard governing appellate review was simply the "clearly erroneous" standard of F. R. Civ. Proc. 52(a), and for the court "[a]ll credibility conflicts were resolved [by the bankruptcy judge] in favor of the [respondent]." The court then said:

> Because of our decision, *infra*, that the first amendment is not implicated in this case, we do not reach TBS' argument that its first amendment claim requires that we independently review the facts.

869 F. 2d at 630; A. pp. 6a - 7a. Next, the court restated the evidence before the bankruptcy judge.[4] After giving a hornbook-like review of the Massachusetts case law, the court correctly stated that with respect to each separate gift a finding of undue influence required proof of "'submission to the overmastering effect of such unlawful conduct.'" 869 F. 2d at 641; A. p. 34a, and the court formally acknowledged that "'there must be a solid foundation of established facts upon which to rest [such] an inference'..." *Id.* at 642; A. p. 37a.

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[4] But at this point there is a striking difference: "Where there is a significant conflict between [respondent's] testimony and those testifying on behalf of TBS, we have stated defendant's testimony in detail." 869 F. 2d at 631; A. p. 8a. Fully one-half of the court's opinion is then taken up simply with stating the differing testimony.

2. The Gifts. With respect to respondent's initial $1 million gift, completed in December of 1984, the court quoted from the bankruptcy judge's findings:

> Well, when we got back in the car [on the way from Framingham to Lenox,] Carl Stevens said to me, "Betsy, it seems like you've really been hearing from the holy spirit." And when he said that, I got three thoughts in my head. One, two, three. And I said, "Yes, I really have been hearing the holy spirit." And in fact, I had my notebook out, and I turned on the little light in the backseat of his car, and I wrote down the three things that I heard in my head that I should do. And the first one was that I should get baptized. The second one was that my children should be dedicated in The Bible Speaks in a certain kind of ceremony that they do with children, and that I should give a million dollars to The Bible Speaks.

869 F. 2d at 642; A. p. 38a. At this time Barbara Baum, Pastor Stevens's soon-to-be-wife and respondent's then close friend, suffered greatly from migraines. Respondent testified that she believed that her financial gifts could help cure those headaches. 869 F. 2d at 633; A. p. 15a. Of this gift, the court of appeals said:

> There is no evidence that making the gift was suggested by anyone at TBS or that anyone at TBS told [respondent] that she should give the money in order to cure Baum's

> headaches. That notion also originated with [respondent] . . . .
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> XXXX
>
> Here, [respondent] received advice from both Jonas and Okabena [her husband and her financial advisors] and she chose to ignore the advice. [Respondent] was in her thirties, in good health, and a college graduate . . . .

869 F. 2d at 643; A. pp. 38a - 39a.

But the court then went on to sustain rescission of the $5 million gift, a gift conceived of only 90 days later, and executed only six months after the $1 million gift. Yet during this entire period, respondent was still "in her thirties, in good health, and a college graduate" - - and still living at home, taking care of her children, travelling widely, and obtaining advice from her financial advisors. Moreover, the notion to give this gift also originated with respondent. As the court of appeals acknowledged, respondent testified that in March she told Pastor Stevens that she "had heard God tell her to give $ 5,000,000 to [petitioner] in June." 869 F. 2d at 634; A. p. 17a.

The court of appeals referred to four factors that, it said, determined "respondent's decision to make [the gift] earlier than had been planned." 869 F. 2d 643; A. p. 40a. *First*, Pastor Stevens, Baum, and another member of the church had "deliberate[ly] fostered respondent's belief that her initial $1 million gift had cured Baum's headaches." The headaches had not been cured. *Second*, "Pastor Stevens's influencing respondent not to tell her husband or family about the gift . . . because Stevens had told her that her family was evil and not to be

trusted." *Third*, the church's "deliberate misrepresentation" to respondent in April that a missionary, Pastor Turkia, was being held in Rumania "at great danger" to his life, even though Pastor Stevens knew then that Turkia's release had already occurred. Respondent's testimony was that she *accelerated* her already planned gift of $5 million because of her belief that it could help effectuate Turkia's release. *Fourth*, and finally, the court pointed to Pastor Stevens having prevailed upon respondent to write that God had prompted her gift and that no one had asked her to make or knew about the gift. The first two statements were true, but "[t]his last part was false. Stevens and Baum knew about the gift . . . and accelerated its delivery." 869 F.2d 643, 644; A. pp. 40a - 41a.

The court then addressed the significance of these four factors:

> These facts lead inexorably to a finding of undue influence. If plaintiff had been told that Baum's headaches had not been cured by her first gift of $1,000,000, *she may not have made the second gift* at all. If she had not been influenced to keep the gift a secret from husband and family, *she may not have gone through with it*. If she had been told that Turkia was in no danger, *she probably would not have accelerated the gift*. And the letter composed by Stevens, dictated by Hill and written by plaintiff is damning evidence that Stevens and Hill knew they were engaging in improper conduct.

869 F. 2d at 644; A. pp. 41a - 42a (italics supplied).

The court set aside the rescission of four small gifts totaling $80,000 made between July and November of 1985, shortly after the $5 million gift. Presumably, respondent had the same fundamental attributes of health, intelligence, etc. Presumably, too, she still believed in her capacity to work miracles by her gifts, and that her gift had cured Baum's headaches and had secured Turkia's release, etc. Yet the bankruptcy judge's findings were overturned for failure of proof.[5] 869 F. 2d at 644; A. p. 43a.

C. The First Amendment. At the close of its opinion, the court brushed aside the first amendment claims of the church. (pp. 47 - 50) The first amendment provides no protection for "purely secular statement of facts . . . merely because they are made by officials of a religious organization." 869 F. 2d at 645; A. p. 44a. The court added:

> Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS or the beliefs of its adherents. The findings and rulings rest solely on secular statements and actions . . . . There has been no inquiry as to whether Stevens and the other TBS adherents were acting in accord with

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5 Indeed, it is only with respect to a single gift, the $5 million gift, that the evidence was deemed sufficient to show that respondent's will was overcome during this entire period until respondent made her final gift of $500,000 at the end of 1985. With respect to that gift, the court concluded that the church "had pervasive control over [respondent's] business and legal affairs," and respondent was "isolated" from her non-church friends. 869 F.2d at 644; A. p. 42a. But see p. 6, n. 3, *supra*. These factors were *not* present at the time of the $5 million gift.

> what they perceived to be the commands of their faith . . .

869 F. 2d at 645; A. pp. 45a - 46a.

Finally, the court dismissed petitioner's claim that, even assuming all credibility findings in respondent's favor, the record made plain that respondent's gifts were in substantial measure the product of respondent's own authentic religious convictions. "[A]s already discussed," the court said, the first amendment does not preclude a determination "whether the secular reasons for making and accelerating the gifts was [sic] the result of undue influence." "Second, the [respondent] has not claimed the protection of the first amendment. TBS may raise only its free exercise claims, not those of the [respondent]." 869 F. 2d at 646; A. p. 46a.

REASONS FOR GRANTING THE WRIT

This petition raises issues of concern to all religious groups, as the *amicii* supporting this petition will show. But they are of especially grave concern to evangelical and fundamentalist religious communities. Their non-mainstream character renders them particularly vulnerable to bias and misunderstanding, both conscious and unconscious, in tort and restitution suits brought by apostate members, particularly former members who have undergone extensive professional deprogramming.[6] *See also Molko & Leal v. Holy Spirit*

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[6] There are over 1200 different religious bodies in the United States and they are marked by a wide diversity in beliefs and practices. *See* Note, *Developments In The Law - - Religion and the State*, 100 Harv. L. Rev. 1606, 1613 - 19 (1987).

Association for the Unification of World Christianity, 46 Cal. 3d 1092 (1988), 762 P. 3d 46, *cert. den.* No. 88 - 1600 (May 22, 1989) (ordering trial on undue influence claim for restitution). And this case illustrates the great damage that such rescission suits can cause to these religious communities. Respondent's $5 million gift was used for the very purposes she prescribed: the construction of a new chapel, a swimming pool for children, and other improvements at The Bible Speaks campus. Petitioner could not restore the gift, and its real estate was sold - - to respondent. The rescission judgment atomized and shattered a once vibrant religious community.[7]

This petition presents an appropriate occasion for this Court's much needed guidance. This Court has not dealt with issues arising out of assertedly improper religious teachings and solicitation since *United States v. Ballard*, 322 U. S. 78 (1944), and the Court has never addressed the questions presented in this petition. The questions presented are not fact-bound and case-specific. They arise even if every pure credibility finding is assumed against petitioner.

This Court should take this petition as an occasion to state that rescission of religiously motivated gifts by apostate members for undue influence is constitutionally impermissible unless there is a finding that *but for* the "non-religious" factors alleged to constitute undue influence, the gifts would not have been made. Moreover, rescission cannot rest on the basis of any assertedly "secular" factor if, at the time of the events, the

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[7] In 1987, The Bible Speaks had 1,300 members, a large campus housing a school for children K - 12, as well as the Stevens Bible School, a radio and television ministry, and about 100 affiliated churches throughout the world. 896 F. 2d at 631; A. pp. 9a - 10a.

parties themselves understood that factor to possess a substantial religious dimension. In addition, undue influence must be determined by the court after exercising its own independent judgment based on the whole record. And finally, proof must satisfy the clear and convincing evidence standard. Acceptance of any one of these four propositions will result in reversal of the court of appeals.

A. State Law Cannot Impermissibly Burden the Right of Religious Communities to Teach Beliefs and Instruct and to Solicit, Retain and Use Voluntary Gifts.

The court of appeals' abrupt treatment of the petitioner's first amendment claims shows the imperative need for guidance from this Court. The court repeatedly acknowledged the religious origin and motivation of respondent's $5 million gift. 869 F. 2d at 634, 643, 645 - 46; A. pp. 15a, 17a, 45a - 46a. But the court said that in relying on these factors, the church improperly attempted to raise respondent's, rather than its own, rights. (p. 46a, *supra.*) This assertion is mystifying. Petitioner surely has a right to teach its religious beliefs to its adherents that is guaranteed by the first amendment. *E.g. Cantwell v. Connecticut*, 310 U. S. 296 (1940). The same is true of petitioner's rights to solicit, receive, and use religious contributions.[8] *Id.* at 306. Those rights do not originate in

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[8] Solicitation of funds by religious communities has long been understood to fall within the core protection accorded by the first amendment. *Cantwell v. Connecticut, supra,* at 306. "It is plain that a religious organization needs funds to remain a going concern." *Murdoch v. Pennsylvania,* 319 U. S. 105, 111 (1943); *Larson v. Valente,* 456 U. S. 228 (1982). Solicitation of funds by any charitable corporation for any legitimate purpose is activity protected by the constitution of the United

state law (although, of course, state law may also independently protect them), but in the first amendment. What a donor lawfully contributes in response to the church's teaching, the church has a corresponding, reciprocal right to receive, keep, and use for church purposes. In asserting the right to be free from being penalized for religious teachings, and the right to keep the donations it has received because of the donor's religious convictions, the church asserts its own rights, not those of a third party. *Cantwell, supra; Murdoch, supra; Larson, supra.*[9]

State law cannot impermissibly burden petitioner's rights to solicit and keep donations, any more than it can impermissibly burden any form of religious liberty or other fundamental right. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe upon the protected freedom," this Court said of the right of religious solicitation in *Cantwell v. Connecticut, supra,* at 304. Even assuming therefore that state law may properly prohibit solicitation by fraud or undue influence, and permit rescission of gifts made in such circumstances, the state law cannot define these concepts so as to undermine the church's fundamental rights to teach and instruct, and to receive donations. Thus, in *United States v. Ballard*, 322 U.S. 78, 86 - 88

States. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U. S. 788, 797 - 98 (1985); *Heffron v. Int'l Soc. for Krishna Consc. (ISKCON)*, 452 U. S. 640, 647 (1981).

9 *See also* the cases cited in note 6, and Hart and Wechsler's *The Federal Courts and the Federal System* 174 (3rd ed., 1988) (P. Bator, *et al.*, eds.). Moreover, a solicitor of funds has standing to assert the donor's rights to resist state regulations. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U. S. 947, 954 - 58 (1984).

(1944), this Court held that in a fraud action the truth of religious beliefs is not a valid subject of judicial inquiry, although the truth of claims asserted on behalf of commercial products is surely a valid subject of such an inquiry.[10]

The need for *some* constitutionally fashioned protection for religious communities is particularly clear here, where the state law relied upon to permit rescission is not fraud but undue influence. The highly anomalous character of a fraud claim based on "wrongly induced" religious beliefs is evident enough. But when compared with undue influence, a fraud action is the very model of a carefully structured cause of action: at a minimum, in a fraud action the plaintiff must prove reliance upon *specific* and *material* representations, etc. That is, plaintiff must show that the gift would not have occurred but for reliance upon one or more specific, material misrepresentations. Undue influence actions present a far graver threat. Surely no argument is needed to establish that a religious conversion produces an "influence" that fundamentally changes the converted. What, then, is "undue"? This respondent was a "born-again-Christian," a believer thoroughly saturated with church and teachings as a result of reading church pamphlets, attending Bible classes and listening to sermons and

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[10] *See also Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 108 S. Ct. 1319, 1325 (1988). *Ballard* is simply one in a long familiar line of decisions in which this Court has constrained otherwise acceptable state law concepts of fraud, obscenity, libel, etc., in order to prevent impairment of underlying first amendment values. *E.g., New York Times v. Sullivan*, 376 U. S. 254 (1964) (libel); *Miller v. California*, 413 U. S. 15 (1973) (obscenity); for a recent example, *see Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (restricting state tort law of intentional emotional injury). *See also Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F. 2d 875, 879 - 883 (9th Cir. 1987) (employing same approach in religious context.)

tapes of church leaders, and interacting with fellow believers in a large and vibrant religious community (p. 13, n. 7). To ask whether such a recently converted donor's will was "overcome" by *some* "impermissible" conduct and "fraudulent" statements invites completely unfocused fact-finding (on the premise that "everything is relevant") and wholly subjective and unstructured judgments on the significance of the facts found.[11] To permit rescission of gifts used for the very purposes designated by the donor on the basis of such after-the-fact, ill-defined judicial inquiries threatens the rights of all religious communities to preach, teach doctrine and to receive donations.[12]

1. But for Causation is Required. Quite plainly, the effect of the court's ruling renders religious communities perpetually hostage to suits by apostate donors who become sufficiently dissatisfied with their former religion, or, more likely, their former religious leaders. The ultimate consequences for the church can be disastrous, as this case illustrates. If the first amendment right of religious communities, particularly non-mainstream ones, are not to be eviscerated by undue influence suits brought by apostate donors this Court must require adequate findings on causation. No rescission can be authorized on the basis of religious factors. More importantly here,

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[11] This Court has long recognized the dangers created by such open-ended inquiries to the interests protected by the free speech and religion clauses. *E. g., Cantwell v. Connecticut, supra,* 310 U. S. at 307 - 308; *Houston v. Hill,* 482 U. S. 451, 465 n. 15 (1987) (collecting cases); *Hustler Magazine v. Falwell, supra.*

[12] These dangers are magnified when the undue influence does not come from physical isolation or dependence but simply from statements allegedly made during conversations at which only the donor and one or more church members are present, and the donor is a witness who has been subjected to an intensive "faith-breaking" process.

rescission of religiously motivated gifts because of alleged non-religious factors is impermissible unless the donor can establish that *but for* the impermissible non-religious conduct the gift would not have been made.[13]

The court's opinion makes clear the need for that minimal constitutional protection. Respondent's $5 million gift was conceived of less than 90 days after her initial $1 million gift. Like the first gift, the second gift was concededly religious in origin and motivation. *Many of the same conditions obtained:* at both times, respondent was a physically healthy, college educated, completely devout "born-again Christian" living at home with her family. The court points to four intervening factors that "lead inexorably" to undue influence. Yet after stating these factors, the court concludes with nothing more than a series of speculative assertions: because of these factors respondent -- a devout "born-again Christian" absorbed in the church's communal life -- "may not have made the second gift," or "probably would not have accelerated the gift." There is not the slightest discussion of what the court believed to be the relationship between these "secular" factors and the complex web of other -- and unchallenged -- authentic religious convictions that led respondent to make this gift. There is no finding that but for these *additional* non-religious or "secular" factors respondent would not have made her religion-driven gift.[14] Nor could there be -- given the conceded intensity of her

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[13] Petitioner has not argued that unless the donor is physically isolated and dependent religious donations are absolutely protected, although there is much to be said for that view.

[14] This proof would be required in any fraud case, and, the court of appeals opinion is little more than a fraud opinion. Virtually every factor relied upon by the court involves alleged deception. *See Kungys v. United*

religious convictions that had been formed as a result of her deep immersion in The Bible Speaks during 1983 and 1984.

2. The Court Below Erred In Using A Secular/Religious Distinction. The need for this Court's direction is further apparent when one examines the assertedly "secular" factors that the court did rely upon in connection with the $5 million gift.[15] It would, of course, offend the first amendment to consider religious factors as a basis for rescission. Yet virtually every "secular" factor mentioned by the court was understood by the parties to have a significant religious dimension. This is especially evident with respect to the findings that Pastor Stevens told respondent that she "should not tell her husband or family about the [proposed] gift . . . because her family was evil and not to be trusted." (869 Fed. at 644, A. p. 41a, *supra*.) Suggestions of that nature had close links to church teachings reflecting a pervasive distrust of outsiders,[16]

States, 108 S. Ct. 1537, 1548 (1988) (misrepresentation must be material to justify denaturalization).

[15] In the court below, respondent's counsel sought to label a wide range of Pastor Stevens's conduct as "secular." ***Virtually all of this conduct occurred after the $5 million gift;*** accordingly, the court of appeals properly did not rely upon the subsequent conduct in considering the validity of the $5 million gift. ***Woodbury v. Woodbury***, 141 Mass. 329, 333, 5 N. E. 275, 280 (1886). ("Undue influence must be exercised in relation to the gift made, and not as to other transactions, in order to invalidate a gift thus attained.")

[16] The uncontradicted evidence showed what common sense alone makes clear: a byproduct of becoming a "born-again Christian" may well have a religion-rooted disruptive influence on a family and friends. But the fact that the conversion may bring such a result is recognized in the Bible itself (*e.g.*, Matthew 10:34-38), and this doctrine has a firm place in Christian theory and in the teachings of The Bible Speaks. Similarly, the uncontradicted evidence showed the church's belief that "outsiders" must

and moreover, they would help overcome the strong opposition of respondent's husband and family to her religiously motivated desire and right to give to the church, and the church's constitutionally protected desire and right to receive her gift.[17]

This Court has recently recalled the difficulty of distinguishing between secular and religious motivation. *E.g., Frazee v. Illinois Dept. of Employment Security,* 109 S. Ct. 1514, 1517 (1989). That effort may be unavoidable where, for example, independent governmental interests are at stake. *Frazee, supra.* But, as between the church and its adherents, no justification exists for judges retrospectively impressing on past events a mode of understanding that was wholly foreign to the participants' own understanding. *Lyng v. Northwest Indian Cemetery Ass'n.*, 108 S. Ct. 1319, 1319 - 20 (1988). The experience at issue "must be defined from the believer's perspective." L. Tribe, *American Constitutional Law* § 14.6 at 1181. From the point of view of both petitioner and respondent her gift was religiously motivated, and the few "secular

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be viewed with suspicion, and, more importantly, that believers must reject "evil reports," particularly those reports critical of pastors and church leaders. Pastor Stevens's book, *The Progression of Conspiracy,* J. A. Vol. X, p. 5811, insists upon the existence of a Satan-inspired conspiracy directed principally against "pastor-teachers" and he instructs the faithful not to entertain false reports against their pastors.

17 Pastor Stevens's request that respondent write the letter that falsely indicated that the church was unaware of the proposed gift did no more than assist respondent in accordance with his (and her) sincere *religious* desire that she should contribute a portion of her wealth to the church, a desire then impeded by the obstacles interposed by her family - - above all her husband, who had bitterly opposed her initial $1 million gift. Indeed, the bankruptcy judge found that Stevens told respondent that [her financial adviser's] divulging of her plans to her father "was an example of the Devil seeking to frustrate God's work. She accepted this characterization. . . ." (J. A. Vol 1, p. 107).

statements of fact" referred to by the court were themselves religious, or at a minimum, possessed a significant religious dimension.[18]

Moreover, in practical terms, the court's "secular" approach in this case is tantamount to licensing a direct inquiry into both the truth and the sincerity of the petitioner's religious beliefs. All religions posit some physical manifestations of belief -- for example, an immaculate conception, a resurrection, miraculous cures, the finding of a sacred book, etc. Are these physical events to be understood as "secular" in nature, open to examination as to their truth or sincerity? This Court has categorically barred inquiries into the truth of religious beliefs. *United States v. Ballard, supra.* This Court has emphasized the dangers to religious liberty in intrusive inquiries into the sincerity of religious beliefs. *Gillette v. United States*, 401 U.S. 437, 455 - 57 (1974).[19] This Court has recognized that extensive inquiry into religious doctrine by a civil court is impermissible. *Serbian Orthodox Diocese v. Milevojevech*, 424 U. S. 696, 709

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[18] At least since *Cantwell v. Connecticut*, 310 U. S. 296, 303 - 304 (1940), this Court has recognized that "religiously motivated conduct" is entitled to significant constitutional protection. *See Goldman v. Weinberger*, 475 U. S. 503, 506 (1986). Similar principles apply with respect to speech. *Riley v. National Federation of the Blind of N. C.*, 108 S. Ct. 1006, at 2667; *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S.Ct. 2138, 2145 (1988) (constitutional protection for "conduct commonly associated with expression").

[19] This danger is particularly threatening to non-mainstream religious communities because the "questioning of sincerity may operate invisibly and subconsciously against unknown or unpopular religions." Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 954 (1989).

Serbian Orthodox Diocese v. Milevojevech, 424 U. S. 696, 709 (1976). And finally, this Court has recognized the uncertainties inherent in any use of a secular/religious distinction. *Frazee, supra.* These decisions reflect the necessity for "breathing space" if religious liberty is to have meaning. The court of appeals' facile application of a "secular/religious" distinction threatens to eviscerate that liberty. No countervailing governmental or third party interest justifies the court's undertaking: here, as in *Ballard* and *Serbian Orthodox Church, supra,* the interests of the parties alone is at issue.[20] Religious conviction suffused the respondent's gift giving, and inquiry into the "sincerity" of all - - or here - - aspects of Pastor Stevens's teachings and beliefs threatens non-mainstream religious communities with bias in fact finding. And surely, even assuming that religious solicitation is partially unprotected to the extent of the solicitor's insincere statements and acts, this fact cannot be deemed controlling unless *but for* causation is established. That minimal protection is necessary to protect religious liberty, if it is not to fall victim to crude labelling and distorted fact finding.

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[20] Justice Jackson's well known *Ballard* dissent would have barred courts from inquiring whether "less than full belief in a credo became actionable fraud if one is soliciting gifts or legacies." *United States v. Ballard, supra,* 332 U. S. at 95. *Ballard* itself, *id.* at 85 - 86, left this issue open.

> "Justice Jackson's argument's against even a judicial inquiry are most convincing when government seeks to protect gullible citizens from fraudulent religious claims, since protection from the 'wrong' of mental and spiritual poison is precisely what the Constitution put beyond the prosecution's reach."

L. Tribe, *American Constitutional Law*, § 14 - 12, p. 1245 (1987).

B. The Constitution Requires the Court to Make an Independent Judgment on the Whole Record and Clear and Convincing Evidence that Religiously Motivated Gifts Are the Result of Undue Influence.

1. Independent Judgment is Required. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof...." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U. S. 485, 510 - 11 (1984). *Bose* is only the most salient modern illustration of the underlying constitutional imperative of searching judicial review where constitutional values are implicated. *See also Miller v. Fenton*, 474 U. S. 104, 112 - 18 (1985) (coerced confession). Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985), particularly at 254 - 59. Thus, every circuit that has faced the issue in the free exercise context has held or implied that the *Bose* principle is fully applicable.[21] Yet both the district court and the court of appeals concluded that they were under no duty to apply the independent judgment rule. The court of appeals laconically remarked:

> Because of our decision, *infra*, that the first amendment is not implicated in this case, we do not reach TBS'

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21 *Friedman v. Board of County Comm'rs*, 781 F. 2d 777, 779 - 80 n.2 (10th Cir. 1985) (suggesting that after *Bose*, independent judgment rule governs review of establishment clause claims); *Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue*, 743 F. 2d 148, 158 n. 9 (3d Cir. 1984) (*Bose* requires *de novo* review in free exercise case); *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 542 n. 3 (3d Cir. 1984) (same), vacated on other grounds, 475 U. S. 534 (1986).

> argument that its first amendment claim requires that we independently review the facts.

869 F. 2d at 630; A. p. 8a. This reasoning involves a plain non-sequitur. Surely it is beyond dispute that the church's constitutionally protected rights to teach and instruct and to solicit and receive gifts means that absent undue influence - - however defined - - gifts cannot be rescinded. Even assuming all evidentiary conflicts are resolved against petitioner, both the district court and the court of appeals should have independently reviewed the whole record and then applied the controlling legal standards to determine whether the bankruptcy judge's ultimate conclusion of undue influence contravened the religious liberty of the church.[22]

Imposition of an independent judgment requirement is particularly appropriate both because of the ill-defined nature of claims of psychological coercion[23] and because the scope of the constitutional right of the church to teach and to receive gifts is

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[22] In the court below, respondent argued that this case involved nothing more than respondent's "credibility." This is plainly wrong. The crucial issue is what is the judicial duty even assuming every credibility finding in respondent's favor. This case presents conventional issues of historical fact - - generally issues that respond to questions of who, what, when, why, and where - - and it presents questions concerning the legal significance of those historical facts. The latter kind of question is not reducible to the former. *Miller v. Fenton*, 474 U. S. 104, 112 - 118 (1985). *See also Maine v. Taylor*, 477 U. S. 131, at 145 - 146 n. 17 (1986). *See generally* Monaghan, *Constitutional Fact Review*, *supra*, (collecting sources discussing this issue).

[23] *See* Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1442 - 1450 (1989) (claims of psychological coercion inevitably have a heavy normative component).

affected by respondent's state of mind.[24] But this case makes clear an additional need that justifies such review. The case against the church hinged entirely on the testimony of a witness who, as a result of extensive deprogramming, became its implacable enemy (pp. 4 - 5, n. 1 and 2). Yet, for the bankruptcy judge, this case was "unsurpassed in our jurisprudence" in revealing "an astonishing saga of clerical deceit, avarice, and subjugation on the part of the Church's founder, Carl H. Stevens." *Id.* 73 B. R. at 849; A. pp. 85a. His opinion proceeding to find *every* conceivable fact, large or small, against the church. Independent review is a necessary safeguard against the risk of distorted, "Good v. Evil" fact finding.[25] The court of appeals' summary statement of the conflicts in the testimony (p. 7, n. 4) does not remotely discharge its duty under *Bose* to render its own dependent judgment on the facts.

2. Clear and Convincing Proof is Required. Much of the foregoing reasoning also mandates an additional procedural safeguard: the basis for rescission must be established by "clear and convincing evidence." That the constitution mandates special burdens of proof in constitutionally sensitive contexts is now thoroughly established. And this evidentiary

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[24] The "actual malice" rule of the libel cases is the best known example; another is *Miller v. Fenton*'s holding that "voluntariness" of a confession presents an issue of law-application that requires a court's independent judgment on the whole record.

[25] *See*, for example, *Miller v. Fenton*, *supra*, 474 U. S. at 114 (independent judgment justified when there is a predictable danger of distorted fact finding); Lupu, *supra*, 102 Harv. L. Rev. at 955 (searching appellate review will help ameliorate the very danger of unconsciously biased fact finding in litigation involving non-mainstream religious communities).

requirement of clear and convincing proof has been especially insisted upon where the scope of the constitutional privilege turns on the actor's state of mind.[26] Moreover, imposition of such a requirement here fully comports with the plurality's recent analysis of the standard in *Price Waterhouse v. Hopkins*, 109 S. Ct. ___, ___ (1989), 57 U.S.L.W. 4469, at 4476 (May 2, 1989). More than money damages is at stake in this case. The gifts were used for the very purposes specified by this donor and the church could not restore them. The effect of the rescission judgment was to shatter an on-going religious community. The church here seeks only to defend itself against such consequences, not to enforce future promised gifts.

The danger to non-mainstream religious communities from distorted fact finding will not be eliminated by a requirement of clear and convincing evidence. But those difficulties will be ameliorated. Indeed, this case presents an excellent illustration of the practical efficacy of such an evidentiary safeguard. No argument is needed to show that the court of appeals' conclusion that respondent "may not" have made her gift does not remotely satisfy such an evidentiary standard.

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[26] *See*, for example, *Bose Corp., supra*, at 511 (actual malice); *Kungys v. United States*, 108 S. Ct. 1537, 1547 (1988) (misrepresentation relevant to naturalization). This principle has been given application in the religious context, as elsewhere. *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363, 242 Cal. Rptr. 823 (1988).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 2, 1989

Respectfully submitted,

s/_____

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No. 88- 88-1977

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1988

In Re:

THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

-against-

ELIZABETH DOVYDENAS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A - JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT [PP. 1a - 47a]

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 88-1254

IN RE:
THE BIBLE SPEAKS
Debtor,

ELIZABETH DOVYDENAS,
Plaintiff, Appellee,

v.

THE BIBLE SPEAKS,
Defendant, Appellant.

JUDGMENT

March 9, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part and reversed in part. The rescession of the gift of $5,000,325 and the rescession of the gift of $500,000

are affirmed. The recession of the gift of $1,001,031.25 and the recession of the gift totalling $80,000 are reversed.

No costs to either party on appeal.

By the Court:

s/ FRANCIS P. SCIGLIANO,
Clerk.

By s/ DANIEL F. LOUGHRY
Chief Deputy Clerk

APPENDIX A

[Judgment and Opinion - USCA (1st Cir. 1989)]

United States Court of Appeals

For The First Circuit

No. 88-1254

IN RE: THE BIBLE SPEAKS,

Debtor.

ELIZABETH DOVYDENAS,

Plaintiff, Appellee,

v.

THE BIBLE SPEAKS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman, *U. S. District Judge*]

March 9, 1989

BOWNES, *Circuit Judge*. In this undue influence case, the defendant church, the Bible Speaks (TBS), appeals the district court's affirmance of the bankruptcy court's finding of liability. *See The Bible Speaks v. Dovydenas*, 81 B.R. 750 (D. Mass. 1988) (*TBS II*); *In re The Bible Speaks*, 73 B.R. 848 (Bankr. D. Mass. 1987) (*TBS I*). The unique procedural history of the case was detailed by the district court.

> TBS brought suit in Berkshire Superior Court [Massachusetts] against Elizabeth Dovydenas on April 14, 1986 seeking a declaratory judgment that it did not owe her any debt or liability and that it did not have to return funds transferred by her. This suit was dismissed on June 13, 1986. The Massachusetts Appeals Court dismissal was affirmed on April 8, 1987.
>
> Elizabeth Dovydenas then brought suit on June 19, 1986 in Berkshire Superior Court against TBS. She sought rescission of gifts made by her between December 1984 and December 1985 because of undue influence and fraud. After its motion to dismiss was denied on July 15, 1986, TBS sought protection of the bankruptcy court filing for Chapter 11 reorganization on July 29, 1986. Its petition, which stayed the state court action, stated that Elizabeth Dovydenas' claim against it was a core proceeding. Elizabeth Dovydenas then filed a proof of claim with the bankruptcy court on October 31, 1986. The three-week trial on the merits began on March 30, 1987 and ended on April 16, 1987. The bankruptcy court issued its final order on May 19, 1987. By assuming jurisdiction of TBS over the claimant's

> objection, the bankruptcy court entered into the process of administering TBS' estate while it reorganized under Chapter 11. 81 B. R. at 753 - 54.

Plaintiff's claim in the bankruptcy court was for the return of gifts made to TBS, allegedly because of undue influence. The bankruptcy court found that the gifts were the results of undue influence and awarded her $6,581,356.25, which was the total of three large gifts and a number of smaller ones. After reviewing the record, the district court accepted and adopted in full the bankruptcy court's findings of facts. Both courts rejected the first amendment - free exercise claim of TBS.

We affirm in part and reverse in part.

I. THE STANDARD OF REVIEW

The bankruptcy court made extensive findings of facts. See *TBS I*, 73 B.R. at 849 - 57. Credibility was a key factor in determining the facts. *Id.* at 857. We review the bankruptcy court's findings of fact under the clearly erroneous standard. Bankr. R. 8013;[1] Fed. R. Civ. P. 52(a).

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[1] Bankruptcy Rule 8013 reads in full:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgement, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

In *Briden v. Foley*, 776 F.2d 379, 381 (1st Cir. 1985), we held, in a bankruptcy case, that the clearly erroneous standard was especially appropriate where credibility was at issue, stating: "Indeed, the clearly erroneous standard was designed to insulate just such findings -- ones that are based, *inter alia*, on weighing the credibility of witnesses." *Id.* at 382. *See also In re Pearson Bros.*, 787 F.2d 1157, 1161 (7th Cir. 1986). The clearly erroneous standard has been explained by the Supreme Court as follows:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 (a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide

> factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U. S. 338, 342 (1949); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U. S. 844 (1982).
>
> * * *
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what it said. *See Wainwright v. Witt*, 469 U. S. 412 (1985).

Anderson v. Bessemer City, 470 U. S. 564, 573 - 74, 575 (1985).

We have reviewed the entire record carefully and conclude that the bankruptcy court's findings, including its credibility determinations, are not clearly erroneous. The bankruptcy court found the testimony of plaintiff and her husband "forthright and credible" and the testimony of defendant's witnesses "evasive and lacking in credibility." *TBS I*, 73 B.R. at 857. All credibility conflicts were resolved in favor of the plaintiff.

Because of our decision, *infra*, that the first amendment is not implicated in this case, we do not reach TBS' argument that its first amendment claim requires that we independently review the facts. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984) (free speech-libel case); *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 542 n.3 (3d Cir. 1984) (free exercise case), *vacated on other grounds*, 475 U. S. 534 (1986).

II. THE FACTS

At issue are three major gifts made by plaintiff to TBS in the amounts of $1,001,031.25, $5,000,325[2] and $500,000 and a number of smaller gifts totaling $80,000. Because of the importance of the facts on the issue of undue influence, we recite them in detail. Much of the testimony of the plaintiff was disputed, denied, or contradicted by Pastor Stevens, founder of TBS, and other members of TBS. Since the bankruptcy court found in favor of plaintiff, we state the facts in the light most favorable to her. Where there is a significant conflict between the plaintiff's testimony and those testifying on behalf of TBS, we have stated defendant's testimony in detail.

The Parties

Elizabeth Dayton Dovydenas, the plaintiff, was born in 1952 and grew up in Minnesota. She is an heir to the Dayton-Hudson fortune. Jonas Dovydenas is a freelance photographer.

[2] These two gifts will be referred to as the $1,000,000 gift and $5,000,000 gift, respectively.

Plaintiff met him in 1977 when he taught a photography class in Minnesota in which she enrolled. In December of 1978, they were married. Because plaintiff was so much wealthier than Jonas, they decided that he need not work in order to support them, but rather, he should concentrate on his art and family projects. Plaintiff had a fortune of approximately $19,000,000, most of which was held by Okabena, the family-owned investment company based in Minnesota. Prior to her gifts to TBS, plaintiff's charitable contributions averaged about $10,000 per year, with a high of $127,000 in 1977 to an art center.

In the Spring of 1981, Jonas and plaintiff moved to Lenox, Massachusetts. The move was unrelated to TBS - - neither plaintiff nor Jonas knew of TBS at this time. They hired Irene Colby as a housekeeper; she happened to be a member of TBS.

After moving to Lenox, plaintiff was interested in joining a church. In 1982, after visiting a few which she did not like, she and Jonas went to TBS. They liked what they saw and heard and left a $500 check in the collection plate.

TBS was founded in 1971 in Maine by Carl Stevens with 35 to 50 members. Stevens has no formal Bible study training but he has been a Fundamentalist preacher for 26 years. TBS is organized as a non-profit organization with Stevens as its head. It has a 12 person Board of Trustees which must approve Stevens' decisions. In case of a deadlock, a group of elders decides the outcome of an issue. In 1976, TBS moved to its current location in Lenox, Massachusetts, having grown to approximately 800 to 900 members. As of 1987, there were approximately 1,300 members. A large campus was purchased with member contributions; it contained a children's school for grades K-12, a nursery and the Stevens School of the Bible.

Stevens taught at the Bible School and preached at the Church. TBS also ran radio and television ministries as well as operating a missionary boat, *La Gracia*, in the Caribbean. It has a network of voluntary affiliates across the globe. In 1982, there were between 18 and 20 such affiliated churches. By 1987, that number had grown to about 100 with a world-wide membership of about 17,000. There are also about 160 missions in 26 countries.

THE PRELUDE

PLAINTIFF'S TESTIMONY

After the $500 check was left in the collection plate, Maureen Shea, plaintiff's new housekeeper and also a member of TBS (who was recommended by Colby when Colby left)[3] brought to the house two TBS pastors, Thomas Schaller and John Lloyd, who set a date for Pastor Stevens to come for tea. Sometime in the Winter of 1982 - 83, Stevens and Barbara Baum, Stevens' lady friend at the time (he later married her), did go to plaintiff's house for tea. At this time, Stevens asked plaintiff and Jonas if they had "accepted Christ" and both answered no. At this first meeting, when Stevens was alone with plaintiff, he asked her for money for a counselling center. She gave him a check for $2,000. Baum and plaintiff were the same age, and they became friends.

Jonas' stay with TBS was brief. At one point he and plaintiff loaned (and later turned the loan into a gift) $50,000

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3 Each replacement or addition to plaintiff's staff was made by one TBS member recommending another.

for *La Gracia*; Jonas also spent some time on *La Gracia* photographing the boat and its missionary operations. Jonas' activity in TBS decreased as plaintiff's activity increased.

In the summer of 1983, plaintiff's and Baum's friendship blossomed as plaintiff began attending TBS services. One day while Baum and plaintiff were talking on TBS campus, plaintiff asked Baum about tithing and being born again. Baum took plaintiff to see Stevens without a prior appointment, which was unusual. The three conferred; Baum took notes for plaintiff. Stevens was told that plaintiff was born again but that Jonas was not. To this, he responded that plaintiff was saved and in the light and that Jonas was not saved and was living in darkness. On the subject of tithing, Stevens directed plaintiff to some Bible passages on the subject of giving and not withholding from God. Baum typed up the notes she had taken and gave them to plaintiff.

In September 1983, plaintiff enrolled in two classes at the Stevens School of the Bible. Stevens taught these classes which met Monday through Friday 8 a.m. to 9 a.m. and had an enrollment of about two hundred students. From 9 a.m. to 10 a.m., plaintiff attended a rap session led by Stevens which was also well attended but not as large as the class. Plaintiff was occasionally alone with Stevens in 1983. Late in 1983, Baum introduced plaintiff to Kathleen Hill, a member and employee of TBS and Baum's best friend. Plaintiff and Hill became friends.

In 1984, plaintiff became more involved in TBS activities and saw much more of Hill and Baum. Early in the year, Hill encouraged her to take charge of a women's seminar which was held in March. Plaintiff saw Hill and Baum

frequently at lunch or TBS sponsored brunches. Plaintiff continued attending classes and rap sessions. She and Stevens also began spending more time together.[4] She began accompanying him on his weekly Friday evening trips to Framingham, Massachusetts, where he preached at an affiliated church. Plaintiff's relationships with her non-TBS friends deteriorated as she spent more and more time with Stevens, Baum, and Hill.

In the period from November 1984 to April 1985, plaintiff saw Stevens alone on a daily basis: driving with him from class to rap sessions; seeing him at 11 a.m. after he finished with Telephone Time (a radio ministry); meeting with him in his office without a prior appointment; and driving with him to and from Framingham. Plaintiff testified that in these private meetings, she was given advice on religious, financial, and personal matters. She was told that she had to obey Stevens because he was the highest authority on earth. She was also told to listen to tapes of Stevens' speeches over and over and to takes notes of all Stevens told her and then study those notes. She was to inundate her mind with Stevens' words. She disclosed her net worth to him, and he told her that her mission in life was to give and that her gifts could cause great events. Many discussions with Stevens, Baum and Hill focused on plaintiff's money and her giving it to others. Stevens told her that Jonas should get a job and that the family only needed $1,000,000 to live on. She was told not to listen to evil reports and that Jonas, his parents and her family were evil and were controlled by Satan and demons.

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[4] There has never been any suggestion that Stevens' and plaintiff's relationship was anything but platonic.

DEFENDANT'S TESTIMONY

TBS' witnesses presented the following version of the same events. At trial, neither Schaller nor Lloyd were asked whether they set up the first meeting between Stevens and plaintiff; Stevens denied having sent them as emissaries. He did dine at plaintiff's house once at her invitation (Baum remembered twice). At this time, he asked if plaintiff and Jonas had accepted Christ; Jonas said no and plaintiff's response is unknown. Baum testified that only Jonas was asked and she took his ambiguous response to mean "no." At this dinner, Stevens did not ask for or receive any money. He did not know that plaintiff was wealthy nor did he encourage the budding friendship between plaintiff and Baum because of her money. It was plaintiff who sought out Baum in the beginning of their friendship.

Stevens did not recall any meetings with plaintiff in 1983. Baum testified that the tithing and born-again conversation occurred in January 1984; Stevens also put the meeting at that time.[5] During the January meetings, they discussed Bible passages on tithing and giving as well as how to relate to Jonas. Stevens did not say that Jonas was a non-believer or that he was unsaved.

Stevens denied seeing plaintiff in 1984 except for class, rap sessions, group lunches and by appointment. He did not recall driving with plaintiff to Framingham until 1985. The

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5 Stevens' calendar shows two meetings with plaintiff and Hill in January. Stevens testified that Hill was detained with TBS work and that Baum filled in for Hill.

women's seminar was plaintiff's idea. Baum saw plaintiff at least once a week, mainly for prayer sessions.

Stevens testified that at no time could plaintiff see him without an appointment. His day was too busy for anyone to do so, except for TBS pastors and emergencies. He never said that he was especially anointed by God or that he spoke the literal truth or that he was the highest authority on earth or that he must be obeyed. Rather, he said that he was God's man just like all preachers are God's men, that he was a sinner like all men and that he was only to be followed when he followed God. He also denied telling plaintiff, or any of his congregation, to fill their minds with only his words. He denied ever telling her that non-believers including Jonas and her family were evil, not to be trusted and controlled by demons. Nor did he say that she had a special calling to give or that her gifts could cause great events on earth. He never told plaintiff that Jonas should get a job or that all they needed to live on was $1,000,000.

The $1,000,000 Gift

PLAINTIFF'S TESTIMONY

Baum and Stevens were engaged to be married in the Fall of 1984. Baum suffered from migraine headaches which regularly incapacitated her. Plaintiff was concerned about the headaches and their impact on the upcoming marriage. Stevens had been telling plaintiff that she was a special person who should give and to whom God could speak.

Plaintiff testified that in the Fall of 1984, before Stevens' wedding, while driving back from Framingham with him, she heard three things in her head, one of which was to give TBS $1,000,000. Shortly thereafter she had a discussion with Stevens; she told him that she was going to give TBS $1,000,000 and that she believed by doing so it *would* cure Baum's headaches. Stevens replied: "Great. I don't know which would be better, the million dollars or having her healed of her headaches." Plaintiff also told Hill and Baum of her intent to give the gift and her belief that it would cure Baum's headaches.

When plaintiff told Jonas about making the gift, he opposed it. Stevens told her to ignore contrary advice from Jonas or anyone else. Jonas contacted Okabena about the gift, and Okabena replied with a letter which detailed various options for giving TBS the money over longer periods of time and with more favorable tax consequences. On November 24, Baum and Stevens were married. The gift, in the form of a transfer of Dayton-Hudson stock worth $1,001,031.25, was completed in mid-December 1984.

On December 13, 1984, Jonas and plaintiff met with Stevens. At that meeting, Stevens said that he would not take any more money from plaintiff without Jonas' consent. After the $1,000,000 gift, Stevens, Baum, and Hill each told plaintiff that Baum's headaches were cured because of the gift. In fact, Baum continued to suffer from migraines but this was kept from plaintiff. Because she had been told by Hill, Stevens and Baum that Baum's headaches had been cured, plaintiff believed that large gifts by her to TBS could effect events on earth. In February and March 1985, Stevens emphasized to plaintiff the importance of obedience, the nearness of the end of the world

and not listening to evil reports. In March and April, Stevens emphasized the ability of the holy spirit to control people.

DEFENDANT'S TESTIMONY

TBS' witnesses presented a different version of these events. Baum's migraines were frequent and severe: she would either be bed-ridden or the pain on her face would be obvious. Stevens never told plaintiff that she had a special calling to give. In the fall of 1984, Jonas told Stevens that plaintiff wished to give a large gift to TBS but did not tell him how much. On November 13, plaintiff told Stevens of the gift and its amount. At this time, she told him that after much prayer God had told her to give the money. Baum testified that plaintiff also told her that God had told plaintiff to make the gift. It was not until three weeks later that plaintiff told Baum that the gift *might* cure Baum's headaches; Baum told Stevens of plaintiff's statement. Hill was not informed of the link between the gift and the headaches until after the gift was completed. The ride from Framingham during which God spoke to plaintiff did not occur.

Stevens was not informed of Jonas' opposition to the gift until January 1985. The December 1984 meeting with Jonas was set up by Jonas to ask Stevens to contribute to a charity with which Jonas was involved. Stevens knew of the Okabena letter but never thought the gift was not freely made. Stevens denied telling plaintiff that she should ignore advice from Jonas or anyone else. He testified that what advice she got was up to her. In a January 2, 1985 meeting, Stevens learned of the marital friction developing between plaintiff and Jonas, but he did not tell her that Jonas should get a job or that she should

give more money to TBS. Until this meeting, he thought that Jonas agreed to making the gift and that the marriage was harmonious. Stevens denied seeing plaintiff except at services from then until March 1985. In the Spring, he gave a series of sermons on giving but these were not directed at plaintiff and dealt with spiritual gifts such as mercy and helps. Stevens denied ever telling plaintiff not to listen to non-TBS members.

Stevens, Baum and Hill all denied telling plaintiff that Baum's headaches were cured. Immediately after the gift was made, Baum did feel better for about three weeks, and plaintiff was told this. But, at a January 2, 1985 lunch, at which plaintiff was present, Baum was stricken with another migraine; although nobody told plaintiff that it was a headache, this fact was obvious to all who were present. No one specifically told plaintiff that the headaches had returned,[6] but, no effort was made to conceal that fact from her.

The $5,000,000 Gift

PLAINTIFF'S TESTIMONY

In March 1985, plaintiff told Stevens that she had heard God tell her to give $5,000,000 to TBS in June. Stevens

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6 Baum offered contradictory testimony as to whether she ever actually told plaintiff that her headaches had returned: at first she said that she had not, but after a recess during which she talked to TBS' attorney, she said that she had.

told her not to tell Jonas about this. In early April, she again discussed the gift with Stevens while Baum was present.

Plaintiff had planned a trip with Jonas and her children to Florida on April 18 for her mother's birthday. On the morning of the 18th, before she left for Florida, Baum called her. Baum told he that Ben Turkia, a TBS pastor, had been detained in Rumania and that "they're probably pulling his fingernails out right now." Baum requested that plaintiff pray for Turkia. Plaintiff proceeded to Florida as scheduled. Jonas left after a few days while plaintiff stayed for another week. Right after Jonas left, on the evening of Sunday April 21, plaintiff called Stevens. She told him that she wanted to give the $5,000,000 right away in order to effectuate Turkia's release, to which Stevens responded, "Great, get a jump on the devil." At this time, he did not tell her that Turkia had already been released. Stevens emphasized that she should not tell anyone, especially Jonas about the gift. The next day, she wrote to Ron Gross at Okabena requesting that the gift be made as soon as possible. She did not discuss the gift with any outside advisors. Upon returning to Lenox, she met frequently with Hill and Stevens. Both cautioned her against telling anyone, including Turkia, that she had worked a miracle, though they assured her that she had.

There was a dispute as to who knew what and when about the events surrounding the Turkia incident. Prior to trial, an attorney for TBS stipulated that: **1.** Turkia and a companion entered Rumania on April 16, 1985; **2.** Turkia and his companion were detained at the border and interrogated; **3.** they were released and returned to Austria *via* Budapest, Hungary on April 17; and **4.** while in Budapest, Turkia called his wife in Baltimore and told her of both the detention and

release - - the call was made on April 17 late in the evening Budapest time (early in the evening Eastern time).

At trial, there was evidence that in April 1985, Mrs. Turkia was living on TBS campus. Turkia and his companion were detained on April 16, 1985 in Rumania. They were released on April 17, arriving in Budapest, Hungary that evening. His companion called a friend in Pennsylvania who was told to call Mrs. Turkia. The friend in Pennsylvania called Mrs. Turkia. Mrs. Turkia immediately called Pastor Schaller, who called Stevens and Baum. By April 18, Turkia was in Austria staying with friends. That evening, Mrs. Turkia called Austria twice. The first call was a short one to friends, but not to where Turkia was staying. The second was a twelve minute call to the house where Turkia was staying. Turkia returned to the United States on April 24.

The bankruptcy court refused to allow TBS to withdraw the stipulation. On a motion by plaintiff, it struck portions of Turkia's, Mrs. Turkia's and Schaller's testimony to the extent they conflicted with the stipulation. The court's finding does not rely exclusively on the stipulation, but is based also on portions of the testimony of the above witnesses. The court found:

> Turkia had been detained by Romanian border guards for only 24 hours, and had been released on April 17th. He arrived in Budapest, Hungary on April 17th at 8:00 P.M. Budapest time, at which point his companion placed a call to a friend in Pennsylvania informing him of what had happened and requesting him to call Turkia's wife. Turkia's wife was immediately informed

> of the detention *and release*. She was then living in Lenox in the home of Edward Canino ("Canino"), an employee of the Church.

TBS I, 73 B.R. at 852 (emphasis added). The court also found "that Stevens and Baum were aware of Turkia's release when they discussed the impending $5 million gift with the [plaintiff] over the telephone on the evening of April 21st." *Id.* at 863.

Upon her return to Lenox from Florida, plaintiff met with Stevens and Hill. At those meetings, strategy for making Okabena deliver the gift quickly and confidentially was discussed. Stevens and Hill told plaintiff what to say to Okabena; except for the first call, Hill was with plaintiff whenever she talked to Okabena. On April 27, 1985, plaintiff, Stevens, Baum, Hill and Hill's husband went to a restaurant. At that time, Stevens told her that her $5,000,000 gift would be particularly influential in shaping the world for the return of God. Stevens also told plaintiff to write a letter to him and told her what to put in the letter. The next day, Hill dictated this letter to plaintiff who wrote it as she was told. The letter was given to Hill who gave it to Stevens. The letter stated that God had spoken to her, which was why she was making the gift, that no one from TBS had asked her for the gift or knew about it and that Stevens was to administer the gift.

On April 30, plaintiff's father called her because he had learned from his brother, an official at Okabena, of the proposed gift. In addition to inquiring about the gift, her father told her that he was going to visit her. She told her father to call back later and immediately called Stevens who told her to come to his office. Once there, Stevens told her to tell her

father that a much smaller amount was being given. She agreed to do so and told Stevens that Jonas would be there that evening and would overhear her talk with her father. Stevens called a TBS employee, Ed Canino, and told him to take Jonas out for a long dinner. That evening plaintiff disarmed her father and convinced him not to visit her. The gift was completed on May 13, 1985 by transferring shares of Dayton-Hudson stock worth $5,000,325 to TBS.

Stevens told plaintiff to get a post office box so that Jonas would not see any mail regarding the $5,000,000 gift or plaintiff's finances. She rented the box on April 30, 1985 and told Okabena to send all mail addressed to her there.

In late May 1985, after Jonas returned from a trip to Afghanistan, Hill, Stevens and plaintiff met. Hill suggested that Stevens write a letter to plaintiff that plaintiff leave the letter for Jonas to find. Thereafter, Stevens wrote a letter to plaintiff stating that she should honor Jonas and seek his advice in major financial matters. Stevens also wrote that he thought Jonas loved his family and God. Plaintiff left the letter for Jonas to find. Despite what Stevens wrote, he told plaintiff not to trust or listen to Jonas because he was a non-believing husband.

DEFENDANT'S TESTIMONY

TBS' version of these events was again strikingly dissimilar. On March 19, plaintiff told Stevens that she was planning another large gift but she did not say how large. This meeting mainly concerned putting her son in a big brother program run by the Church. During the meeting, plaintiff also

raised concerns about Jonas and his spendthrift ways. Stevens realized that there were serious problems when plaintiff said that Jonas was going to die because of his demons. Stevens told her not to judge Jonas.

On April 11, Stevens met with plaintiff again. When she again stated that she wished to make a large gift, he asked her if the gift would harm her marriage, her family or her future security. She replied that it would not. Stevens was still not told how large a gift plaintiff was considering but gained some idea of the amount when plaintiff circled some items she wanted the gift to go toward. Because of TBS' policy against direct solicitation of gifts, Stevens asked plaintiff whether there had been a solicitation by any TBS member. Plaintiff responded that there had been no solicitation and that God had led her to give. She asked Stevens if he wanted this in writing and Stevens replied that he would.

Turkia is connected not only with TBS but also with other religious groups. The trip he made in April 1985 was for an organization unconnected with TBS.[7] Turkia was acquainted with plaintiff and Jonas because he had worked on plaintiff's estate cutting wood. Pastor Schaller told Stevens of the detention on April 16 or 17. Schaller had learned this from Mrs. Turkia who thought the friend in Pennsylvania had said that Turkia was still in custody and was facing a long prison sentence. Mrs. Turkia contended that she was unable to reach Turkia when she called Austria on April 18. As of the evening of April 21, the people at TBS still believed Turkia to be under Rumanian detention. On that evening, after regular services, a

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[7] This claim of no connection with TBS is undercut by the fact that TBS wrote a $1,000 check to Turkia's travelling companion in June 1985.

special prayer service was held for him. Stevens did not learn of the actual chronology until after Turkia returned. Schaller learned of Turkia's release between April 21 and 24 when he called the friend in Pennsylvania and learned of the miscommunication between Mrs. Turkia and the friend. He then informed Mrs. Turkia, Baum and Stevens of Turkia's release.

On April 21, plaintiff spoke to Baum and *not* Stevens. In that conversation, plaintiff did not say that she wanted to give the gift earlier in order to save Turkia but rather, she wanted to give earlier as an inspiration from Turkia. Upon Turkia's return and at all times thereafter, nobody at TBS attempted to hide the actual chronology from plaintiff and no one ever told her that her gift had caused Turkia's release. Plaintiff was not prevented from discussing the events with Turkia when he was in Lenox.

As to when Stevens knew of the amount of the gift, he and other TBS pastors testified that it was not until after the Turkia incident was concluded.[8] They said that several large gifts were being discussed during this time frame. Stevens learned of the amount when he received plaintiff's letter on April 28. Stevens did not request that letter except as noted above and he did not ask Hill to get plaintiff to write it. The meeting at which plaintiff said he requested the letter did not occur. Stevens contended that it could not have occurred since he stayed in Framingham on the night of April 26 - 27 - - TBS produced a hotel and a restaurant receipt to confirm this. On the 27th, he drove to Rhode Island and then to Connecticut to

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[8] Contradictory deposition statements by Schaller were explained by Schaller and others as due to nervousness at the deposition and severe pain in April 1985 due to an automobile accident.

deliver a speech. Late that afternoon, he returned to Lenox and immediately went to a sports banquet.

Hill denied helping plaintiff with the letter except to provide a Bible citation when asked by plaintiff. Hill never told plaintiff how to get Okabena to deliver the stock faster. She knew that plaintiff made six calls to Okabena but was only present at plaintiff's request.

With respect to keeping the gift confidential, Stevens felt that he should honor plaintiff's wishes. He, therefore, did not tell her family about the gift. He arranged for Jonas to be out of the house because he could tell that plaintiff had not told Jonas of the gift and did not want to do so. Stevens felt that plaintiff should do as God told her and that his first responsibility was to his communicant. He did not advise her either way about seeking outside advice. Baum told him that the gift was not proceeding quickly but he did nothing. He did not see plaintiff from April 11 until the gift was completed.[9] He did not know of the post office box until the litigation began.

The May 20 letter to plaintiff was a sincere letter which Stevens sent because of the continuing problems between Jonas and plaintiff. It was not a sham and neither Stevens nor Hill asked plaintiff to leave it where Jonas would find it. Stevens was not telling plaintiff in private anything that was contrary to what he said in the letter.

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[9] This testimony by Stevens is inconsistent with his other testimony that he met with plaintiff on April 30--when he arranged for Canino to take Jonas out to dinner, though he claims he played a much lesser role in those arrangements than plaintiff alleged.

An Active Interlude

PLAINTIFF'S TESTIMONY

Because of Okabena's breach of confidentiality (in telling her father of the planned $5,000,000 gift) and because Stevens suggested it to her, plaintiff decided to retain a new attorney, a new stockbroker and a new accountant. In June 1985, Stevens and Hill introduced plaintiff to Andrew Campoli, TBS' attorney. Stevens also introduced her to James Freed, a broker with Dean Witter Reynolds, Inc. (Dean Witter) who had been recently retained by TBS to be its broker (mainly to handle the $5,000,000 gift). Finally, plaintiff chose Rick Burkhart, TBS' accountant, to be her accountant. She chose all three based on Stevens' recommendations without delving into their qualifications.

From July to November 1985, plaintiff met with Campoli many times, always with Hill in tow. Some meetings were taped by plaintiff at Hill's request. Hill reported to Stevens all that occurred at the meetings. The two reasons for seeing Campoli were the drafting of a new will and the drafting of an agreement between Jonas and plaintiff.

The will was discussed for five months before plaintiff executed it on December 13, 1985. In the will, she left the bare statutory minimum to Jonas, with Stevens as trustee for most of

that. She left only her jewelry to her children.[10] Everything else went to TBS.

Stevens wanted her to get Jonas to sign an agreement after some unflattering newspaper articles appeared in a local paper, the Berkshire Eagle. The articles were a three-part series which reported allegations of dissension among former TBS members and pastors, improper actions by Stevens and other TBS members to get people to give money to TBS and eavesdropping by TBS. Hill was a major force in the drafting of the agreement--several drafts are in her handwriting. In pertinent part, the agreement stated that plaintiff would give Jonas $1,600,000 to do with as he wished, plaintiff would not make gifts from the principal of her estate without Jonas' consent, and plaintiff was leaving Jonas "an incredible amount" in her will.[11] Jonas in return was to stop harassing plaintiff about her gifts and her beliefs. Plaintiff signed the agreement on December 16; Jonas never did. Stevens told plaintiff that the part about not giving from principal was only to be for a short time.

Freed, plaintiff's new broker, communicated his thoughts about investing plaintiff's money to Stevens, but not to plaintiff, at Stevens' request. No one told her that Freed was also TBS' broker. Plaintiff's fortune was transferred from

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[10] Plaintiff sold all of her jewelry in November 1985 while on a trip to New York City with Hill. The proceeds were donated to TBS. Prior to her connection with TBS, plaintiff had already created two trust funds for her children with over $1,000,000 in them; these trusts were not affected by the will.

[11] This last provision was in obvious conflict with the will which was being prepared by Campoli.

Okabena to Dean Witter.[12] Freed advised her to sell all of her Dayton-Hudson stock and invest in higher income-producing items. She discussed the tax implications with both Freed and Burkhart, TBS' accountant. She sold the stock and incurred a large tax liability. At trial, she did not remember writing a letter to Freed in which she stated that she understood the tax implications of the sale and still wanted to go through with it. Jonas was never informed of the change to a new attorney and broker.

Between July and November, 1985, plaintiff gave TBS an additional $80,000 in a series of checks: $14,000 in July; $50,000 in September; $10,000 in October; and two checks for $4,000 and $2,000 in November. No evidence was introduced as to the events surrounding these gifts. Plaintiff also gave Stevens $10,000 in cash in November.[13]

DEFENDANT'S TESTIMONY

Witnesses for TBS gave the following account of the same events. Plaintiff asked Stevens for the names of Christian lawyers and brokers; she was very disturbed by Okabena's breach and wished to cut her ties with that organization. Stevens

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12 A portion was retained by Okabena in order for plaintiff to meet some limited partnership obligations that would come due in the future and that plaintiff could not avoid.

13 The bankruptcy court included the gifts to TBS in its judgment for plaintiff, it did not allow the $10,000 to Stevens because that was a personal gift to Stevens, not TBS. *See TBS I*, 73 B.R. at 870. Plaintiff has not appealed this exclusion.

supplied her with the name of an attorney he got from a born-again organization, but plaintiff chose Campoli on her own after meeting with him. Campoli is not a born-again Christian. Stevens thought that plaintiff knew Freed before he introduced them; he thought they had initially been brought together by another TBS pastor. Plaintiff chose Freed as a broker only after extensively questioning him about his qualifications while in Stevens' office.

Stevens knew nothing about plaintiff's new will. Any input from Hill was at plaintiff's request; plaintiff was a headstrong lady who insisted on things being done as she wished. Any taping of meetings was done at plaintiff's request. Neither Hill nor Campoli reported to Stevens about their meetings. Plaintiff sold only a small portion of her jewelry while in New York, mainly items she no longer wore. Giving Jonas a large sum of money was an old idea pre-dating plaintiff's joining TBS. The idea was originally an estate planning mechanism. Stevens was in favor of an agreement between Jonas and plaintiff as a last effort to save their marriage.

Plaintiff's account at Dean Witter required her approval on all transactions before they were made and Freed obtained her approval before any transactions were made. Stevens contended that he had no active role in plaintiff's account even though he lost $10,000 in options trading through the account.

Stevens was very concerned about plaintiff's marriage. In the Fall of 1985, he had meetings with plaintiff concerning her marriage and Jonas' family. On November 7, 1985, he suggested that she try to reach an agreement with Jonas in order to stabilize the marriage. He denied that the timing of

this suggestion was related to the publication of the Berkshire Eagle Articles a few days earlier. It was at this time that Stevens and TBS adopted a policy of not accepting gifts without the consent of both spouses. The new policy was not a reaction to the Berkshire Eagle Articles, but rather, was a further attempt to salvage plaintiff's marriage. Plaintiff was informed of this policy. Baum and others told Stevens that plaintiff was headstrong and would continue giving no matter what she was told. Because of this new policy, Stevens rejected a gift of two vans by plaintiff in the late Fall 1985. On November 22, plaintiff met with Stevens and told him that she would go through with the agreement. On December 10, Stevens and plaintiff met again; this time to discuss threats made against TBS and its members.

The $500,000 Gift

PLAINTIFF'S TESTIMONY

In December 1985, plaintiff decided to give another $500,000 to TBS. The genesis of this gift occurred as follows:

> Well, while Kathy Hill was living in my home, and Jonas was in Afghanistan, Kathy told me one day that she overheard a conversation while working in the business office between Bruce Dunbar and Jack Leonard. And Jack Leonard had been telling Bruce Dunbar that for the completion of phase two and for phase three to start, that the Bible Speaks needed $500,000 for T.V. equipment, and she told me that she

> overheard that, and he made me wait all day long to hear her tell me that.
>
> And I was beside myself about my relationship with Jonas, and when she told me that, I thought that if I gave $500,000, that that would solve my marriage problems, and she -- Kathy Hill wept and cried and thought that it was -- that's why she had overheard the conversation, so that I could give that money.

Plaintiff wrote a check on her Dean Witter account in that amount and a note stating that she had been led by God to make the gift. But Hill had other ideas:

> She [Hill] told me [plaintiff] that she thought that from now on whenever I gave money to the Bible Speaks that I must give it in a way so that Carl Stevens would never know about it. And so she investigated how I could give money so that there would be no record of it.

Hill and plaintiff then arranged for an anonymous $500,000 gift to TBS using a cashier's check. Plaintiff received no advice concerning this gift from anyone but Hill.

DEFENDANT'S TESTIMONY

TBS' witnesses presented another version of the same events. Stevens knew nothing about the $500,000 gift until this litigation began. In December 1985, plaintiff and Hill

approached Pastor Leonard and asked him how to make an anonymous gift. He suggested the use of a cashier's check. Plaintiff requested that Leonard tell Stevens to go on television but asked Leonard not to tell Stevens from where the funds for this were coming. Leonard honored her wishes and told Stevens as little as possible: he told Stevens that a gift would be coming but did not tell him the amount or who was making the gift. Leonard was the president of the Stevens Bible School but was not a trustee of the Church. He, therefore, did not know and had no reason to know of the new policy concerning spousal consent of gifts. Prior to the $500,000 gift, Leonard knew of TBS' policy of not accepting gifts from plaintiff's principal, and he knew that Stevens had rejected the gift of two vans by plaintiff. Leonard did not explain how two vans (worth approximately $40,000) would violate the policy against invading plaintiff's principal but a gift of $500,000 would not. The gift was not returned when Stevens learned of its source because litigation had begun and TBS needed the money as a defense fund.

The Denouement

Throughout the Summer and Fall of 1985, plaintiff's relationships with her friends and family continued to deteriorate. Her family was concerned about the changes in plaintiff. Her father saw her in Minnesota in the Summer and in Lenox in the Fall. Plaintiff's sister, a social worker, was very concerned after plaintiff and Hill visited her in New York in November 1985.[14] At that time, Hill was present at and active

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[14] This was the jewelry selling trip.

in most of plaintiff's conversations with her sister. Plaintiff specifically denied to her sister having given TBS any money.

The Berkshire Eagle Articles appeared in early November 1985. Jonas' father sent the articles to plaintiff's father who distributed them to other family members. At this point, the family, including Jonas after he returned from Afghanistan, decided that something had to be done. They arranged to have plaintiff examined by a psychiatrist without her knowledge while she was in New York in December.[15] They also decided to have plaintiff come to Minnesota without any TBS members on hand through the pretense of a surprise birthday party for her father.

On December 26, 1985, plaintiff and Jonas met with Stevens in his office. At this time, Jonas asked Stevens whether he had received any gifts from plaintiff since the $1,000,000 gift. Stevens response was to "slap [] his table, he had the Bible there, he said, 'Jonas, I swear before Jesus Christ and on the Bible that I have never taken any money from Betsy without your knowledge.'" Although Stevens' statement was not true, plaintiff believed it to be true.

The family's ruse worked: plaintiff and Jonas went to Minnesota without any TBS members accompanying them. Once there, a surprise birthday party was duly held at a house other

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[15] This examination was accomplished as follows. Plaintiff's sister hosted a musical evening at her apartment in New York and invited plaintiff and the psychiatrist, Dr. Halperin. After being introduced, the plaintiff and Halperin talked together for about forty-five minutes. Plaintiff did not know that Dr. Halperin was in fact examining her. In January 1986, Halperin examined plaintiff again, this time with her knowledge and consent.

than her family's. After the party, the family told plaintiff that they wished to talk to her and to introduce her to two other people. This was the beginning of the exit counselling or deprogramming.[16] After initial resistance, plaintiff began to accept the treatment, which consisted of talking to her family and the two exit counsellors and of viewing videotapes about cults and mind control groups. The turning point for plaintiff was when Jonas reminded her of the December 26, 1985 meeting with Stevens in which he swore he had taken no further gifts without Jonas' knowledge. When she realized that she had believed this patent lie, she decided that she needed help.

No one threatened plaintiff with the loss of her children or an incompetency hearing if she refused the exit counselling. Nor did anyone force plaintiff to remain in Minnesota. Her family wanted plaintiff to be able to think for herself; they were not interested in changing her religious beliefs.

After a week with her family, plaintiff and Jonas went to Unbound, an Iowa program, for more exit counselling before returning to Lenox. During this time, plaintiff drafted a new will and consented to a temporary conservatorship.

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16 Although there was some discussion on the difference between these two terms, the terms were used, for the most part, interchangeably at trial. For consistency, we will use the term used by the bankruptcy court--exit counselling.

III. MASSACHUSETTS LAW ON UNDUE INFLUENCE

In Massachusetts, "the elements necessary to prove undue influence [are]' (1) A person who can be influenced, (2) the fact of deception practiced or improper influence exerted, [and] (3) submission to the overmastering effect of such unlawful conduct.'" *Miles v. Caples*, 284 N.E. 2d 231, 235 (Mass. 1972) (quoting *Neill v. Brackett*, 126 N.E. 93, 94 (Mass. 1920)). "The nature of the undue influence that will invalidate a will or a transfer inter vivos is explained in *Neill v. Brackett*,... . As to either sort of instrument, the nature and effect of undue influence is the same." *O'Hearn v. O'Hearn*, 97 N.E. 2d 734, 735 (Mass. 1951). "[I]t generally takes less to establish undue influence" when a confidential relationship exists between the parties. *Heinrich v. Silvernail*, 500 N.E. 2d 835, 841 (Mass. App. Ct. 1986) (citing *Doggett v. Morse*, 12 N.E. 2d 867 (Mass. 1938)), *further review denied*, 503 N.E. 2d 665 (Mass. 1987); *see also Bruno v. Bruno*, 422 N.E. 2d 1369, 1372 (Mass. 1981) ("unfair persuasion in the context of a confidential relationship constitutes undue influence in Massachusetts"); *Neill*, 126 N.E. at 94 ("careful scrutiny" must be given to transactions involving fiduciaries or intimate parties). It is important to point out what we have decided this case assuming that there is *no presumption* of undue influence in such circumstances.[17] We

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[17] The district court cited *Barnum v. Fay*, 69 N.E. 2d 470 (Mass. 1946), for the proposition that "there is a presumption of undue influence when a gift is made pursuant to a confidential relationship." *TBS II*, 81 B.R. at 760. *Barnum*, however, dealt with the higher fiduciary relationship between an attorney and a client. *See also Markell v. Sidney B. Pfeifer Foundation, Inc.*, 402 N.E. 2d 76, 94 (Mass. App. Ct. 1980) (transactions with fiduciaries are "presumptively improper"). To reach the level of a fiduciary relationship, however, it must "manifest the

have assumed no more than that one in a confidential position has a duty to disclose facts which should be disclosed in light of the confidential relationship. *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 402 N.E. 2d 76, 95 - 96 (Mass. App. Ct. 1980) (quoting *Reed v. A. E. Little Co.*, 152 N.E. 918, 920 (Mass. 1926)). This is a principle that would apply to religious and nonreligious circumstances alike. We also have strictly applied the legal rule that, the burden of showing undue influence is on the party seeking to avoid the transfers. *See Tarricone v. Cummings*, 166 N.E. 2d 737, 740 (Mass. 1960) (collecting cases).

Massachusetts has never directly addressed the question of whether a pastor-communicant relationship is *per se* a confidential one when undue influence is alleged.[18] We need

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relinquishment of control over financial affairs, the conferral of wide authority to act on important matters and make discretionary judgments, or the degree of reliance that usually lie[s] at the core of recognized fiduciary relationships... ." *Heinrich*, 500 N.E. 2d at 841 n.8. There has been no claim that Stevens or anyone else from TBS stood in a fiduciary relationship *vis a vis* plaintiff. The bankruptcy court refused to use a presumption because of the unsettled state of Massachusetts law in this area. *TBS I*, 73 B.R. at 859 (collecting cases and discussing issue). We adopt that court's statement that "the parties have tried this case without reference to presumptions, and we decide it without relying on any presumption." *Id.*

[18] The closest the Supreme Judicial Court has ever come is in *New England Merchants Nat'l Bank of Boston v. Mahoney*, 255 N.E. 2d 592, 595 (Mass. 1970), where the following is stated:

> J. Harold Mahoney's contention that Right Reverend Monsignor Enright exerted undue influence on and abused his confidential relationship with Dr. Mahoney does not require extensive discussion. No evidence was introduced concerning the relationship, other than that the men were friends, and that Dr. Mahoney was one of Monsignor Enright's parishioners. In addition, we note that the appointments to Monsignor Enright were not personal gifts.

not decide whether Massachusetts would hold that the pastor-communicant is by itself a confidential relationship. Here, we have found such a relationship on the basis of *other* factors alone such as the close contact between the parties in the context of their relationship, *Heinrich*, 500 N.E. 2d at 840 - 41, and knowledge by the recipient that the donor trusted or depend upon him, *Eddy v. Eddy*, 183 N.E. 268, 270 (Mass. 1932), and requests by the donor for the recipient's advice or help, *Doggett*, 12 N.E. 2d at 870.

"Undue influence, while sometimes susceptible of proof by direct testimony, may be exercised by indirect and secret ways, which are disclosed only in their result." *Raposa v. Oliveira*, 141 N.E. 870, 870 (Mass. 1924). Because undue influence is often practiced in "veiled and secret ways," its existence may be inferred from such factors as disproportionate gifts made under unusual circumstances, the age and health of the donor, and the existence of a confidential relationship. *Neill*, 126 N.E. at 94; *see also Eddy*, 183 N.E. at 269 (inexperience with financial matters and disposition of funds needed to generate sufficient income are facts to be considered); *Slater v. Munroe*, 55 N.E. 2d 15, 16 (Mass. 1944) (comparing size of questioned bequests to size of entire estate).

Two other factors are also important under Massachusetts case law. One, attempts by the recipient to isolate the donor from her former friends and relatives can be considered in determining undue influence. *See, e.g., Livermore v. Seward*, 41 N.E. 2d 290, 295 (Mass. 1942); *Smith v. Stratton*, 18 N.E. 2d 328, 330 (Mass. 1938); *Mirick v. Phelps*, 8 N.E. 2d 749, 751 (Mass. 1937); *Hoffman v. Hoffman*, 78 N.E. 492, 493 (Mass. 1906). Two, a court can "also consider that she [the donor] acted without independent and disinterested advice... ." *Old*

Colony Trust Co. v. Yonge, 18 N.E. 2d 335, 337 (Mass. 1938); *see also Tarricone*, 166 N.E. 2d at 741; *Israel v. Sommer*, 197 N.E. 442, 447 (Mass. 1935); *Raposa*, 141 N.E. at 871. Thus, the continuation of former relationships and the availability of independent counsel may help in counteracting an inference that undue influence played a role in the transactions.

In sum, "[a]ny species of coercion, whether physical, mental or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the person [who gives]." *Neill*, 126 N.E. at 94. Nonetheless, "[t]here must be a solid foundation of established facts upon which to rest an inference of its existence." *Neill*, 126 N.E. at 94. And, "[t]he mere opportunity to exercise undue influence and the mere existence of a confidential relationship do not establish undue influence... ." *Eddy*, 183 N.E. at 270.

At trial, TBS stipulated that plaintiff was "susceptible", *i.e.* a person who could be influenced, thus conceding the first prong of the Massachusetts undue influence test. Our discussion, therefore, will focus on the second and third prongs of the test: deception practiced or improper influence exerted and submission to the unlawful conduct.

The $1,000,000 Gift

With these principles in mind, we turn to the first large gift made by plaintiff to TBS. Plaintiff testified that the idea for the $1,000,000 gift came to her as follows:

> Well, when we got back in the car, [on the way from Framingham to Lenox,] Carl Stevens said to me, "Betsy, it seems like you've really been hearing from the holy spirit." And when he said that, I got three thoughts in my head. One, two, three. And I said, "Yes, I really have been hearing the holy spirit." And in fact, I had my notebook out, and I turned on the little light in the backseat of his car, and I wrote down the three things that I heard in my head that I should do. And the first one was that I should get baptized. The second one was that my children should be dedicated in The Bible Speaks in a certain kind of ceremony that they do with children, and that I should give a million dollars to the Bible Speaks.

There is no evidence that making the gift was suggested by anyone at TBS or that anyone at TBS told plaintiff that she should give the money in order to cure Baum's headaches. That notion also originated with plaintiff. Stevens had told her that her mission was to give and that her gifts would affect great events; at this time, he did not, however, make any specific statements or suggestions.

There is no doubt that Stevens stood in a confidential relationship with respect to plaintiff. But, a confidential relationship even when combined with the opportunity to unduly influence a person does not prove undue influence. *Eddy*, 183 N.E. at 270. The actions of Stevens and others were not sufficient to give rise to an inference of undue influence. General statements by Stevens and others that plaintiff should give to TBS and that such gifts would do great works are too

amorphous to show undue influence. When the plaintiff told Stevens about her belief that the gift would cure Baum's headaches, his "nondisclosure" about this belief was not about a *fact*. A statement (or non-statement when there is a duty to disclose) about "conditions to exist in the future" is not a misrepresentation. *See Chedd-Angier Prod. Co. v. Omni Publications Int'l, Ltd.*, 756 F. 2d 930, 939 (1st Cir. 1985) (collecting Massachusetts cases). Stevens was under no duty to tell plaintiff that her gift would not cure Baum. At trial, Stevens was not asked whether he believed that the gift could cure Baum's headaches. The failure to disclose the fact that Baum's headaches were not in fact cured occurred *after* the gift was made and could have in no way influenced the gift.

This is not a case, as with subsequent gifts, where the plaintiff had already been misled by prior statements, or where she was convinced to give earlier than she planned to, nor is this an instance where a direct solicitation was made under circumstances where the plaintiff was emotionally isolated from all outside advice and believed her gifts could affect temporal events.

Here, plaintiff received advice from both Jonas and Okabena and she chose to ignore the advice. Plaintiff was in her thirties, in good health, and a college graduate. Plaintiff has failed to establish a "solid foundation" upon which to infer that undue influence was applied to effectuate the $1,000,000 gift. We hold that the courts below erred in finding that this gift was the result of undue influence.

The $5,000,000 Gift

Although the thought of making this gift originated with plaintiff, her decision to make it earlier than had been planned was determined by four factors, all of which were fashioned by TBS' agents. The first was the deliberate fostering by Stevens, Baum and Hill of plaintiff's belief that her gift of $1,000,000 had cured Baum's headaches. The fact was that the headaches continued and all three knew it. Plaintiff testified that, because she believed Baum's headaches had been cured, "I felt that my money had great power and I felt that -- I even became to feel that my money -- that in giving money to The Bible Speaks that I could change the course of history. I could change human history." Stevens fostered these thoughts: "He said that my money -- he said that when I gave money to The Bible Speaks that, that released God's judgment and that that judgment would show itself in cataclysmic events."

The second factor was Stevens' influencing plaintiff not to tell her husband or family about the gift. Plaintiff testified that when she told Stevens that she was going to give TBS $5,000,000 in June, he replied:

> Great. And then he said that he thought that Jonas should not know about this gift.
>
> ...
>
> He thought that it was really important that Jonas not know, because -- because satan was controlling Jonas, and he didn't believe that we should let the enemy know

> about this, because he thought that the enemy would try to stop this gift from happening. And he thought that Jonas would just be letting all the demons in hell loose if he were to know.

Plaintiff did not tell any member of her family of her intention to give TBS $5,000,000 because Stevens had told her that her family was evil and not to be trusted.

The third factor was the deliberate misrepresentation by Baum and Stevens that Turkia was being held in Rumania at great danger to his life. Plaintiff told Stevens in April that she wanted to give TBS the $5,000,000 immediately instead of in June as she had planned in order to effectuate Turkia's release. Stevens encouraged this and did not tell that Turkia had already been released and was in no danger.

The fourth factor was the letter Stevens prevailed upon plaintiff to write stating that the gift was prompted by God, and that no one from TBS asked her to make the gift or knew that she was going to make it. This last part was false. Stevens and Baum knew about the gift before it was made and accelerated its delivery.

These facts lead inexorably to a finding of undue influence. If plaintiff had been told that Baum's headaches had not been cured by her first gift of $1,000,000, she may not have made the second gift at all. If she had not been influenced to keep the gift a secret from husband and family, she may not have gone through with it. If she had been told that Turkia was in no danger, she probably would not have accelerated the gift. And the letter composed by Stevens, dictated by Hill and

written by plaintiff is damning evidence that Stevens and Hill knew they were engaging in improper conduct.

There was a solid foundation of evidentiary facts from which undue influence was properly found.

The $500,000 Gift

While plaintiff's husband was abroad and Hill was staying at plaintiff's home, Hill told plaintiff that she overheard a conversation between two TBS officials that $500,000 was needed for television equipment. Plaintiff was greatly concerned about her marriage and decided to give the money in an attempt to resolve her marital problems--having already been convinced that her gifts could effectuate such wishes. Rather than make the gift directly and openly, Hill prevailed upon plaintiff to make it anonymously and without other advice.

We agree with the lower courts that this gift was the result of undue influence. There was a not so subtle appeal for a large gift when plaintiff was concerned about her marriage, and Hill knew that plaintiff believed that large gifts could affect temporal events. The circumstances surrounding the gift were suspicious. At the time, TBS had pervasive control over plaintiff's business and legal affairs. The gift was made without outside advice at a time when the plaintiff was isolated from her non-TBS friends and relatives and when her husband was away.

The Small Gifts Totalling $80,000

Plaintiff introduced no evidence at trial with respect to the circumstances surrounding the $80,000 in checks she gave TBS in the Summer and Fall of 1985. TBS did not waive the need for separate proof as to each gift. While TBS' attorney admitted that, as a practical matter, these gifts did not make much of a difference, he nonetheless stated that "[i]t's all an issue and they have to make proof to any and all of it." Because of the dearth of evidence, plaintiff has failed to present a solid foundation of facts from which to find undue influence was the cause of these gifts. Neither court below offered an analysis or discussion of these gifts beyond noting their occurrence, *TBS II*, 81 B.R. at 753; *TBS I*, 73 B.R. at 856, and a conclusionary statement "that all of the [plaintiff's] gifts were the product of undue influence exercised upon her by the Church through Stevens," *id.* at 863 - 64. The rescission of these gifts must be reversed.

IV. The First Amendment Defense

TBS makes two arguments for invoking the protection of the first amendment. The first is that the statements and/or actions of Stevens and others that influenced the plaintiff to make the gifts are protected by the free exercise clause. Or to put it more broadly, the free exercise clause shields the solicitation of funds by a religious organization from attack; the gifts are sacrosanct. This argument invokes the protection of the free exercise clause for TBS.

The second argument, by contrast, seeks the protection of the free exercise clause for the plaintiff, the donor of the gifts. TBS argues that at the time the gifts were made, the only influence plaintiff was under was that of God and her religious beliefs or that even if the gifts were in part caused by improper influence by TBS agents, they were also the result of plaintiff's own sincerely held religious beliefs. In either case, the courts are precluded from inquiring into plaintiff's reasons for making the gifts.

We first determine whether the first amendment shields the acts of TBS agents from inquiry and attack. The free exercise clause reads: "Congress shall make no law... prohibiting the free exercise [of religion]...." The extent and limits of this constitutional guarantee have been delineated. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court set aside a conviction for breach of the peace because it violated the petitioner's constitutional guarantees of religious liberty and freedom of speech. During the course of the opinion, the Court stated: "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Id.* at 306. The Court has made it clear that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 713 (1981). The clause does not allow purely secular statements of fact to be shielded from legal action merely because they are made by officials of a religious organization.

> Non constat that we accept the breadth of defendants' deductions from the First Amendment cases, leading to their repeated assertions that their religious freedoms are being interfered with. Their case of *United States v. Ballard*, [322 U.S. 78 (1944)], merely holds that there can be no claim that a professed religious tenet was not honestly advanced. It does not hold that a religious organization may make such secular statements as it chooses in seeking contributions, so long as they serve a charitable purpose.

SEC. v. World Radio Mission, Inc., 544 F. 2d 535, 537 n.3 (1st Cir. 1976); *see also Van Schaick v. Church of Scientology of California, Inc.* 535 F. Supp. 1125, 1141 (D. Mass. 1982) ("The First Amendment protects utterances which relate to religion but does not confer the same license for representations based on other sources of belief or verification."); *id.* at 1140; *Molko v. Holy Spirit Ass'n for Unification of World Christianity*, 762 P. 2d 46, 64 - 65 (rescission of gift on undue influence grounds can be based on secular fraudulent statements concerning the nature of the organization one is joining, *reh'g denied & opinion modified*, 47 Cal. 3d 470a (Cal. 1988).

Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS or the beliefs of its adherents. The findings and rulings rest solely on secular statements and actions. The facts relied upon have not been derived from an inquiry into the religious principles of TBS or the truth and sincerity of its adherents' beliefs. There has been no inquiry as to whether Stevens and the other TBS adherents were acting in accord with what they perceived to be the commands of their faith. *See Thomas v. Review Bd.*, 450 U.S. at

716. Those who run TBS may freely exercise their religion, but they cannot use the cloak of religion to exert undue influence of a non-religious nature with impunity. The five million dollar gift and the half million dollar gift might have had their seeds in the religious beliefs of plaintiff but they were both nurtured and brought to fruition by misstatements and distortions of facts that had no basis either in the religious tenets of TBS or the plaintiff's religious beliefs.

The second argument, which seeks to shield plaintiff's reasons for making the gifts from judicial examination, fails for two reasons. First, as already discussed, the court was not prevented by the first amendment from determining whether the secular reasons for making and accelerating the gifts was the result of undue influence. Second, the plaintiff has not claimed the protection of the first amendment. TBS may raise only its free exercise claims, not those of the plaintiff. *See Wisconsin v. Yoder*, 406 U.S. 205, 230 - 31 (1972) ("It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right to free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent."). TBS cannot use plaintiff's former religious beliefs as a shield against plaintiff's claim of undue influence.

We find, as did the courts below, that the free exercise clause to the first amendment is not implicated.

The other issues raised by defendant have been considered but do not merit discussion.

APPENDIX A

[Judgment and Opinion - USCA (1st Cir. 1989)]

SUMMARY

The rescission of the gift of one million dollars is reversed.

The rescission of the gifts totalling $80,000 is reversed.

Affirmed in part, reversed in part.

No costs to either party on appeal.

The motion of April 12, 1988 by plaintiff to dismiss this appeal on the grounds that TBS has no standing to appeal is denied.

APPENDIX B - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [PP. 48a - 83a]

United States District Court

DISTRICT OF MASSACHUSETTS

THE BIBLE SPEAKS,
Debtor-Appellant

v.

APPEAL NO. 87-0124-F

ELIZABETH DOVYDENAS,
Claimant-Appellee

MEMORANDUM AND ORDER

January 25, 1988

FREEDMAN, C.J.

I. INTRODUCTION

This is an appeal from a final order of the bankruptcy court pursuant to 28 U.S.C. §158. This Court, having reviewed the entire record, accepts and adopts in full the bankruptcy court's findings of fact in *In re The Bible Speaks*, 73 B.R. 848

(Bankr. D. Mass. 1987). Only those facts necessary for understanding the discussion of law are summarized below.

II. FACTS

Elizabeth Dayton Dovydenas ("Elizabeth Dovydenas," "claimant") is a college graduate in her mid-thirties. The Bible Speaks ("TBS," "appellant," "debtor") is an evangelical fundamentalist church formerly located in Lenox, Massachusetts. The church's pastor, president, chief executive, and chief operating officer is Carl H. Stevens ("Stevens") who founded the church in 1973.

Elizabeth Dovydenas is an heir to a substantial fortune, with a net worth of $19 million, and is married to Jonas Dovydenas. In 1982, Elizabeth Dovydenas began attending services at TBS. She became increasingly involved in the church and became close friends with Stevens, his wife Barbara Baum Stevens, and a church employee Cathy Hill ("Hill"). *Id.* at 850.

By fall 1984, TBS and the Stevenses had become important parts of Elizabeth Dovydenas' life. The bankruptcy court found that during that time, "Stevens told her, in substance, on numerous occasions that: giving money to the church was her primary mission on earth; all she needed to live on was $1 million, and the rest should be given to the church; she should not be influenced by her husband, or her parents, sisters or advisors, because they have not been born again through the church and are therefore controlled by the Devil, and her money gave her power to release God's judgment in order to effect miracles." *Id.* at 851. The bankruptcy court also found that the claimant accepted and believed all of this. *Id.*

In November, 1984 Elizabeth Dovydenas gave her first large gift to the church. Stevens' wife Barbara suffered from severe migraine headaches and, based on what Stevens had told her about the power of her money, Elizabeth Dovydenas told Mr. and Mrs. Stevens that she heard "a message from God that she should give $1 million to the church in order to cure [Mrs. Stevens'] migraine headaches." *Id.* at 851. The Stevenses urged her to do so. Elizabeth Dovydenas then effected the transfer by contacting the family's financial advisor, Okabena Company ("Okabena"), located in Minneapolis. Okabena suggested that for tax purposes she not give the money in a lump sum. Jonas Dovydenas also counselled his wife against donating the money, but Stevens told her not to listen to her financial advisor or her husband since they were motivated by the devil. After receiving Elizabeth Dovydenas' gift, Stevens told her that his wife's migraines were cured. This reinforced Elizabeth Dovydenas' belief that, as the bankruptcy court stated, "she was a special person anointed by God to promote good through gifts of her money to the church." *Id.* at 852. Stevens hid from Elizabeth Dovydenas the fact that his wife continued to suffer from migraines and was hospitalized for treatment in January of 1985. *Id.*

In early April 1985, Elizabeth Dovydenas told Stevens that she heard another message from God telling her to give $5 million to the church. Stevens counselled her not to tell anyone, especially her husband. Soon after their conversation, Jonas and Elizabeth Dovydenas went to Florida on vacation. Mrs. Stevens called Elizabeth Dovydenas there on April 18 to inform her that one of the church's pastors, Benjamin Turkia, was being detained by border officials in Rumania. She asked Elizabeth Dovydenas to pray for him and told her "[t]hey are probably

pulling out his fingernails right now." *Id.* at 852. Actually, Turkia had been released the day before and immediately sent word to his wife who was staying with a TBS employee in Lenox, Massachusetts while her husband was gone. On April 21, five days after Turkia's release, Elizabeth Dovydenas, still believing Turkia was in captivity, called Stevens to say she wanted to donate her $5 million immediately so as to release God's power on behalf of obtaining Turkia's release. Again, according to the finding of the bankruptcy court, Elizabeth Dovydenas believed that she had the power from God to obtain Turkia's release by giving money to TBS. Stevens, who knew Turkia had already been released, told her: "Good. Get a jump on the Devil." *Id.* at 852. Elizabeth Dovydenas learned on her return that Turkia was free and she was encouraged by Stevens, Mrs. Stevens, and Hill to think that it was her pledge which freed him.

The events which followed constituted an elaborate effort on Stevens' part that no one dissuade Elizabeth Dovydenas from giving her $5 million gift. The bankruptcy court found that Stevens told her to write a letter stating her gift was voluntary and later on April 28, Hill dictated the letter to Elizabeth Dovydenas. *Id.* at 853. He told her not to tell her husband about the gift. He also told her to rent a post office box so her husband would not see the mail from Okabena, and he coached her to be aggressive in talking to Okabena. Later, after learning of his daughter's prospective gift, Dovydenas' father telephoned her to dissuade her from carrying out her plan. *Id.* Stevens told her to lie to her father and arranged for her husband to be taken out to dinner so that he would not overhear the conversation between Elizabeth Dovydenas and her father. *Id.* Finally, after the $5 million gift was executed, Stevens began a program which resulted in Elizabeth Dovydenas

transferring her assets to a broker loyal to TBS, firing her lawyer, and drafting a new will with TBS' own lawyer which left substantially all her wealth to the church at the expense of her husband and children. Seven individuals associated with the church were made executors and Hill was made guardian of Elizabeth Dovydenas' children in the event Elizabeth Dovydenas' husband predeceased her. *Id.* at 854 - 55.

Following the $5 million gift, a number of other gifts were made in relatively small amounts. One gift was given according to a plan orchestrated by Stevens in which Stevens told Elizabeth Dovydenas to make out a cashier's check for $500,000 and then deliver it to Hill with a typed unsigned note. After that, Elizabeth Dovydenas made gifts of $14,000 in July 1985, $50,000 in September 1985, $10,000 in October 1985, and $4,000 and $2,000 in November of 1985. She also personally gave Stevens $10,000 in cash in November 1985. *Id.* at 856.

In December 1985 Elizabeth Dovydenas' family, alarmed by the changes in her personality, invited her to Minnesota. When she arrived, her family arranged for her to meet with two exit counselors who "spoke to her about the psychological aspects of organizational membership." *Id.* at 857. After a few weeks, Elizabeth Dovydenas "gradually came to her senses about Stevens." *Id.* at 857. She consented to a temporary conservatorship, made a new will leaving her estate to her husband and children, and returned to Lenox.

APPENDIX B

Memorandum and Order [D. Mass. 1988]

III. PROCEDURAL HISTORY

TBS brought suit in Berkshire Superior Court against Elizabeth Dovydenas on April 14, 1986 seeking a declaratory judgment that it did not owe her any debt or liability and that it did not have to return funds transferred by her. This suit was dismissed on June 13, 1986. The Massachusetts Appeals Court dismissal was affirmed on April 8, 1987.

Elizabeth Dovydenas then brought suit on June 19, 1986 in Berkshire Superior Court against TBS. She sought rescission of gifts made by her between December 1984 and December 1985 because of undue influence and fraud. After its motion to dismiss was denied on July 15, 1986, TBS sought protection of the bankruptcy court filing for Chapter 11 reorganization on July 29, 1986. Its petition, which stayed the state court action, stated that Elizabeth Dovydenas' claim against it was a core proceeding. Elizabeth Dovydenas then filed a proof of claim with the bankruptcy court on October 31, 1986. The three-week trial on the merits began on March 30, 1987 and ended on April 16, 1987. The bankruptcy court issued its final order on May 19, 1987. By assuming jurisdiction of TBS over the claimant's objection, the bankruptcy court entered into the process of administering TBS' estate while it reorganized under Chapter 11. The matter is now before this Court on appeal from the bankruptcy court's final order pursuant to 28 U.S.C. § 158.

IV. DISCUSSION

This action is a claim by Elizabeth Dovydenas against TBS for the $6,581,356.25 which she states she gave while a victim of undue influence. Although one of the parties to this action is a church, and the other a former member of a church, the dispute is purely secular. For reasons which will be detailed below, this Court has made no inquiry into the validity of the debtor's religious doctrine. Nor is this an action by a disgruntled member of a religious sect claiming that she was induced to join a false religion. *See Molko v. Holy Spirit Associate for the Unification of World Christianity*, 179 Cal. App. 3d 450, ___P. 2d___, 224 Cal. Rptr. 817 (1986), re-reported *Molko v. Association*, (1986, 1st Dist.) 188 Cal. App. 3d 49, *review granted*, (court cannot assess reasonableness of church's belief in order to adjudicate claim by former members that they were manipulated to accept church's beliefs). Rather, despite appellant's attempts to make it seem otherwise, this is an ordinary undue influence action brought pursuant to a claim in bankruptcy against a debtor's estate. This Court, sitting here as an appellate court, will address sequentially the three major components of the case: the standard of review, undue influence, and the application of the first amendment. It will also review a motion for summary judgment brought by the debtor.

A. STANDARD OF REVIEW

Appellant asks this Court for a *de novo* review of the law and the facts found by the bankruptcy court. This Court is

obligated to conduct a *de novo* review of law. *Molerio v. Federal Bureau of Investigations*, 749 F. 2d 815, 820 (D.C. Cir. 1984). A trial court's findings of fact, however, are usually reviewed on a "clearly erroneous" standard so that they will only be set aside if the trial court was "clearly erroneous." *Id.* Bankruptcy Rules 7052 and 8013 confer upon the findings of a bankruptcy court the same standard on review as Rule 52 of the Federal Rules of Civil Procedure accords the findings of a district court on appellate review: that findings of fact must be upheld unless "clearly erroneous." Nonetheless, a claim which is identified as a non-core proceeding allows for a *de novo* review of the factual findings of the bankruptcy court. Appellant raises a series of arguments on appeal which, in direct contrast to its arguments before the bankruptcy court, attempt to achieve *de novo* review of the bankruptcy court's findings of fact by identifying Elizabeth Dovydenas' claim against TBS as a non-core proceeding.

Because this Court sits as an appellate court, it will not consider arguments raised on appeal which were not raised below. *Singleton v. Wulff*, 428 U.S. 106 (1976) (general rule is that a federal appellate court does not consider an issue not passed on below); *Rowlett v. Anheuser-Busch, Inc.* 832 F. 2d 194, 201 n.4 (1st Cir. 1987) (issues not raised at trial not properly before appellate court); *Johnson v. Holiday Inns, Inc.*, 595 F. 2d 890 (1st Cir. 1979). The appellant's attempt to do so here is especially inappropriate since it successfully sought jurisdiction in the bankruptcy court by arguing strenuously that Elizabeth Dovydenas' claim was a core proceeding. On August 15, 1986 TBS filed a motion entitled "Motion of Debtor Seeking an Evidentiary Hearing on All Issues Raised by Dovydenas August 11, 1986 Motions and Opposition Thereto." In it, appellant argues that the bankruptcy court should assume jurisdiction of

the claim because it could provide quick and final adjudication. It argued, *inter alia*, that the proceeding was core stating that "if [Elizabeth Dovydenas] does not file a timely proof of claim, the Debtor will file a proof of such claim (§ 501 (c)) for the purpose of filing an objection to such claim (§ 502(b)). The proceedings upon an objection to a claim is [sic] a 'core proceeding' pursuant to 28 U.S.C. § 157 (b) (2) (B)." Motion at 2. The bankruptcy court granted TBS' motion asserting that it had jurisdiction to "quickly and simply" render a final decision. *In re the Bible Speaks*, 65 B.R. 415, 427 (Bankr. D. Mass. 1986). Only after losing in the bankruptcy court is appellant attempting to change its characterization of the matter as non-core.

Even if this Court were inclined to consider arguments raised for the first time on appeal, appellant's arguments are without merit. Nevertheless, this Court will review appellant's arguments as they exhibit many serious misinterpretations of modern bankruptcy law. In short, appellant makes three arguments as to why this Court should engage in *de novo* review of the bankruptcy court's findings of fact: first, the matter is non-core because it considers a principle of state law; second, the matter is non-core because the bankruptcy court made findings of fact about persons other than the claimant and debtor; and third, the matter is non-core because the debtor, as a church, has a first amendment right to review by an Article III court.

1. The Claim is a Core Proceeding Even Though it Considers a Principle of State Law

As stated above, appellant cannot argue that Elizabeth Dovydenas' claim is non-core having achieved the jurisdiction of

the bankruptcy court by arguing that it was a core proceeding. Not only is this argument barred by the conventions of appellate procedure, it is also incorrect. Elizabeth Dovydenas' claim against TBS is a classic claim against a debtor's estate. Indeed, hers is the major claim against the debtor's estate. As such, it is specifically listed by statute as an example of a core proceeding. 28 U.S.C. § 157 (b) (2) (B).

Appellant's argument, apparently stemming from a misreading of *Northern Pipe Line Co., v. Marathon Pipeline Company*, 458 U.S. 50 (1982), is that because Elizabeth Dovydenas' claim is based on the state law principle of undue influence, it is not a core matter. *Marathon* is a landmark bankruptcy case questioning the constitutionality of the broad powers granted the bankruptcy courts by the 1978 Bankruptcy Act. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (the "1978 Act"). Specifically, *Marathon* held that the resolution of a state law action owned by the debtor was not a core proceeding. *Marathon* did not, however, have the dramatic effect ascribed to it by the appellant.

This Circuit, following the lead of the Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), construes *Marathon* narrowly. *See in re Arnold Print Works, Inc.*, 815 F. 2d 165, 169 (1st Cir. 1987). The mere fact that a claim asserts state law does not make it non-core. *Id.* The First Circuit stated that "[t]he fact that a claim in a bankruptcy matter raises issues of state, rather than federal law does not by itself determine that it is non-core, rather than core. A claim [for example] by a creditor for money owed by the debtor . . . might depend entirely upon . . . state law . . . ." *Id.* at 169. Even appellant admits that Elizabeth Dovydenas' claim

"arguably fits within the literal wording of the [statutory] definition of core proceedings." Appellant's Brief at 44.

This Circuit has also held, specifically, that the "clearly erroneous" standard of review is constitutionally permissible after *Marathon*. In *Briden v. Foley*, 776 F. 2d 379 (1st Cir. 1985), the First Circuit rejected an argument that *Marathon* required the stricter *de novo* standard of review. The court held that "Bankruptcy Rules 7052 and 8013, which require the application of the clearly erroneous standard to a bankruptcy court's findings of fact, are constitutional as applied to core proceedings .... The Supreme Court's decision in [*Marathon*] casts no doubt on this conclusion." *Briden*, 776 F. 2d at 381. *See also In re Shop-n-Go of Maine, Inc.*, 38 B.R. 731 (Bankr. D. Maine 1984). Since Elizabeth Dovydenas' claim is a core matter and since findings of fact in core matters are by law reviewed according to the "clearly erroneous" standard, appellant's claim for *de novo* review is contrary to law.

2. Elizabeth Dovydenas' Claim is a Core and Not a "Related To Proceeding" even though the Bankruptcy Court Made Findings of Fact Regarding Persons Other than Claimant and Debtor

Appellant contends that because the bankruptcy court made findings of fact regarding persons other than the claimant and the debtor, it converted the claim into a "related to proceeding" which is reviewed as a non-core proceeding pursuant to 28 U.S.C. § 1334 (2) and is the subject of special procedures contained in 28 U.S.C. § 157 (c) (1). *See* Collier on Bankruptcy, ¶ 3.01 [1] [c] [iv-v] (15th ed. 1987). Briefly, "related to

proceedings" are "those which (1) involve causes of action owned by the debtor that become property of the estate under section 541, and (2) suits between third parties which in one way or another affect the administration of the title 11 case." *Id.* at 3.01 [1] [c] [iv]. Appellant's argument appears to be based on the bankruptcy court's finding of fact that Carl Stevens, aided by his wife and Cathy Hill, exerted undue influence on Elizabeth Dovydenas. Since these findings were about persons other than the claimant and debtor, argues appellant, they were only "related to" the action between the claimant and the debtor.

This argument defies common sense. The bankruptcy court assessed no liability against Stevens, his wife, or Cathy Hill. Nor did it award relief to any person except the claimant Elizabeth Dovydenas. In fact, the bankruptcy court specifically declined to include in Elizabeth Dovydenas' recovery a $10,000 gift which Elizabeth Dovydenas made personally to Carl Stevens. Instead, the only recovery allowed was of money given by the claimant, Elizabeth Dovydenas, to the debtor, TBS.

Having noted above the Supreme Court's decision in *Thomas*, and the First Circuit's interpretation in *Arnold*, which avoid construing *Marathon* as barring core proceedings based in state law, this Court sees no barrier to permitting the bankruptcy court to make findings of fact regarding a state law claim between a debtor and claimant. Since Elizabeth Dovydenas' claim of undue influence is based on the actions of Stevens, aided by his wife and Hill, in his official capacity as an officer of TBS, it was essential for the bankruptcy judge to determine how Stevens' statements to Elizabeth Dovydenas and her husband, contributed to his exercise of undue influence. *See infra* at 18 - 25. Thus, the bankruptcy court's findings of fact

were directed at the claim between claimant Elizabeth Dovydenas and debtor TBS. This was not a "related to proceeding."

Finally, appellant's argument attempting to separate findings of fact about Stevens from findings of fact about TBS is really a claim that because the debtor is a corporation, any finding regarding the actions of humans is a "related to" rather than a core proceeding. This argument ignores the most basic principle of corporate law which is that a corporation acts through human agents. *Holmes v. Bateson*, 583 F. 2d 542, 560 (1st Cir. 1978). The corollary to this is that a corporation is liable for acts committed by its agents on the corporation's behalf. *United States v. Petus*, 732 F. 2d 1004, 1008 (1st Cir. 1984) (citing *United States v. Hartley*, 678 F. 2d 961, 970 (11th Cir. 1982)). Thus, in every case where a corporation is the debtor, the bankruptcy court must make findings regarding the actions of human agents. For example, when evaluating promissory notes, the bankruptcy court must always make a finding regarding the human who signed the note. It is not disputed that Stevens was an agent of TBS. Nor can it be disputed that his acts were intended to benefit TBS by providing it with money. Indeed, the bankruptcy court in its ruling distinguished between the $10,000 gift which Elizabeth Dovydenas gave Stevens personally and the $6,581,356.25 which she gave him in his capacity as an agent for TBS by excluding the $10,000 gift from Elizabeth Dovydenas' recovery. If this Court accepted appellant's argument that any findings of fact except those concerning claimant and debtor are "related to proceedings," then it would be impossible for any action against a corporate debtor to be a core proceeding. Such is obviously not the intent of Congress and will not be adopted by this Court.

3. The *Bose* Decision is Not Applicable

The Appellant's third argument for characterizing Elizabeth Dovydenas' claim as non-core is based on a misreading of the Supreme Court case, *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Appellant claims that the bankruptcy court's findings of fact which led it to conclude that TBS had exerted undue influence were based on false statements made by Elizabeth Dovydenas. Appellant cites *Bose* for the proposition that cases raising first amendment issues should be subject to *de novo* rather than the clearly erroneous standard of review. Thus, it concludes, this Court should review *de novo* the bankruptcy court's decision to find that Elizabeth Dovydenas' statements regarding the actions of Stevens, his wife, and Cathy Hill were true.

In *Bose*, a manufacturer of loud speakers sued the publisher of a consumer magazine for "product disparagement." The district court found that there was a first amendment issue at stake but held that in order to recover, the manufacturer would have to prove actual malice on behalf of the magazine. *Bose Corporation v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1270 (D. Mass. 1981). The First Circuit, however, reversed the district court after a *de novo* review of the district court's conclusions of law, not its findings of fact. *Bose Corporation v. Consumers Union of United States, Inc.*, 692 F. 2d 189, 195 (1st Cir. 1982) ("[W]e recognize that we are in no position to reconsider the credibility of witnesses and must leave questions of demeanor to the trier of fact"). The Supreme Court then affirmed the First Circuit, writing that in libel cases requiring a finding of actual malice for recovery, as outlined in

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the appellate court has a duty to make a *de novo* review of the trial court's legal conclusion. *Bose*, 466 U.S. at 498 - 501.

This narrow holding does not alter Rule 52 of the Federal Rules of Civil Procedure which calls for appellate courts to exercise the "clearly erroneous" standard when reviewing findings of fact by the trial court. *Id.* at 498 - 99. The Supreme Court in *Bose* specifically stated that "our standard of review must be faithful to both Rule 52 (a) and the rule of independent review applied in *New York Times v. Sullivan.*" *Bose*, 466 U.S. at 499 - 500. Moreover, the Supreme Court minimized the effect of its holding on Rule 52 by stating that the appellate court must always review the entire record in order to make its determination whether or not the trial court's findings of fact were "clearly erroneous." *Id.* at 500. Finally, the Supreme Court noted:

> Rule 52(a) commands that 'due regard' shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due. Indeed, as we previously observed, the Court of Appeals in this case expressly declined to second-guess the District Judge on the credibility of the witnesses.
>
> *Id.* at 499 - 500.

Nothing in *Bose* then warrants the appellant's claim that the facts in any case which might raise a first amendment issue must be reviewed *de novo.* It is the job of the bankruptcy court, as the trier of fact, to determine which of Elizabeth Dovydenas' statements were or were not to be believed. To the

extent that the bankruptcy court's findings are not clearly erroneous, they must be adopted by this Court in making its review of the law.

Unconvinced by appellant's arguments, this Court finds that the bankruptcy court's decision in *In re the Bible Speaks* was a final decision of a core matter and thus subject to Bankruptcy Rule 8013's "clearly erroneous" standard of review. This is consistent with Fed. R. Civ. P. 52 (a). The clearly erroneous standard is especially appropriate here because the court's findings rest, to a great extent, on demeanor evidence and evaluation of a witness' credibility rather than documentary evidence. The First Circuit recently held that regarding the credibility of witnesses, "no subject matter is more clearly within the exclusive province of the fact-finder." *O'Brien v. Papa Gino's of America, Inc.*, 780 F. 2d 1067, 1076 (1st Cir. 1986). The court wrote further that "questions of credibility are factual findings that must on appeal be resolved in favor of affirming the trial court's findings, unless shown to be clearly erroneous." *Id.* at 1076 (citing *United States v. United States Gypsum*, 333 U.S. 364 (1948)).

Thus, after conducting a careful review of the record and of the bankruptcy court's findings, this Court concludes that the bankruptcy court's findings of fact are not clearly erroneous and must be affirmed. The facts set out in the beginning of this Memorandum and Order, then, are merely a summary and do not supplant the bankruptcy court's findings of fact. The bankruptcy court's findings of fact are based on oral testimony and documentary evidence. It found Elizabeth Dovydenas and her husband to be "forthright and credible." 73 B.R. at 857. It found the testimony of Stevens, his wife, and Hill to be "evasive

and lacking in credibility [which] . . . conflicted with much undisputed documentary evidence." *Id.*

Given that the bankruptcy court's findings of fact are not clearly erroneous, this Court must next conduct a *de novo* review of its findings of law. *In Re Mazzola*, 23 B.R. 263 (Bankr. D. Mass. 1981).

B. UNDUE INFLUENCE

Elizabeth Dovydenas claims that she was under undue influence when she gave money to TBS. Facts found by the bankruptcy court support a conclusion that claimant Elizabeth Dovydenas' gift was motivated by undue influence on the part of the debtor. Federal courts must apply the substantive law of the state except in matters governed by the federal constitution or acts of Congress. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Since there is no federal law of undue influence, Massachusetts law applies. In order to succeed in a claim of undue influence in Massachusetts, the leading cases hold that the burden is on the donor to prove that 1) she was susceptible to undue influence; 2) undue influence was exerted; and 3) she submitted to the overmastering effect of such undue influence. *Miles v. Caples*, 362 Mass. 107, 284 N.E. 2d 231 (1972); *Neill v. Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920). In *Bruno v. Bruno*, 384 Mass. 31, 442 N.E. 2d 369 (1981), the Supreme Judicial Court further defined undue influence as "unfair persuasion of one party under the domination of another . . . [which] seriously impairs the free and competent exercise of judgment" by the donor. *Id.* at 34. After making a careful review of the record and of the law, this Court is satisfied that

the bankruptcy court found facts which are legally sufficient to satisfy the three-prong test of undue influence in *Neill*.

1. Susceptibility to Undue Influence

The bankruptcy court found that the parties stipulated to Elizabeth Dovydenas' susceptibility to influence during an *in camera* proceeding before the bankruptcy judge on April 8, 1987. Transcript of In Camera Proceedings, April 8, 1987 ("Tr.") at 9. The stipulation was not objected to by either party either before the bankruptcy court or on appeal. According to the transcript made available to this Court, the bankruptcy judge read the following stipulation into the record: "The parties stipulate that Elizabeth Dovydenas was at relevant times with respect to the various gifts, donations in dispute, susceptible to influence as that concept is used in the Massachusetts cases, such as *Neill* . . . and others, with respect to the threshold element of an undue influence case." Tr. at 9-11.

According to the transcript, the stipulation was intended to forestall lengthy psychiatric testimony regarding Elizabeth Dovydenas' susceptibility to influence. Appellant argues, and this Court agrees, that a stipulation that Elizabeth Dovydenas was susceptible to influence does not mean that she was, in fact, influenced. It merely establishes the first prong of a three prong test.

2. Exertion of Undue Influence

The second part of the test for undue influence asks whether the influence was, in fact, exerted. To satisfy this part

of the test, appellee must show both that influence was exerted and that the influence exerted was undue.

a. Was Influence Exerted?

Appellant challenges the claim that Stevens influenced Elizabeth Dovydenas to give money to TBS. Appellant contends that the following facts controvert the bankruptcy court's conclusion that influence was exerted on Elizabeth Dovydenas: she initiated the gifts to TBS, decided their amounts, gave the $1 million gift before she heard Mrs. Stevens' migraines were cured, and was in Florida when she decided to give the $5 million to free Turkia. Appellant has also requested that this Court weigh the bias of the witnesses who testified regarding influence exerted on Elizabeth Dovydenas as to the likelihood of their telling the truth. This Court, however, will only review whether the bankruptcy court's findings of fact that Elizabeth Dovydenas was the object of influence by TBS were clearly erroneous. Again, this Court will not usurp the bankruptcy court as the finder of fact by weighing the "bias" of witnesses or the likelihood of their telling the truth as appellant has requested.

Despite appellant's arguments that Stevens did not directly tell Elizabeth Dovydenas to give money to TBS, the bankruptcy court's conclusion remains that Stevens did tell her that "giving money to the church was her primary mission on earth; all she needed to live on was $1 million and the rest should be given to the church; she should not be influenced by her husband, or her parents, sisters or advisors, because they have not been born again through the church and are therefore controlled by the devil, and her money gave her the power to release God's judgment in order to effect miracles." 73 B.R. at

851. Thus, regardless of whether Stevens directly made requests for money from Elizabeth Dovydenas, the facts as found by the bankruptcy court support a conclusion that TBS did influence Elizabeth Dovydenas' decision to donate. Even if Stevens did not originate the idea that her money could change events in the outside world, he confirmed her belief that it could, even though this was not one of his religious beliefs. *See infra* 28-29. On two notable occasions Stevens reinforced Elizabeth Dovydenas' conviction that money could influence events. First, Stevens told Elizabeth Dovydenas that she cured his wife's migraines. Second, he told Elizabeth Dovydenas that she effectuated Turkia's release when he knew that her money had not done either thing. In this way, his behavior influenced Elizabeth Dovydenas' decision to give money to TBS even though he did not explicitly appeal to her for donations. For these reasons, this Court finds that Stevens exerted influence on Elizabeth Dovydenas.

b. Was Influence Undue?

According to Massachusetts law, there is a presumption of undue influence when a gift is made pursuant to a confidential relationship. *Barnum v. Fay,* 320 Mass. 177, 181, 69 N.E. 2d 470 (1946). A variety of relationships have the potential for control that justify a characterization of "confidential" relationships. They include relationships with the donor's attorney, guardian, spouse, friend, and psychiatrist as well as clergyman. Clark, *Gratuitous Transfers*, 249-252 (1986). While the bankruptcy court did not rely on presumptions, presence of a confidential relationship remains strong evidence of the exertion of undue influence.

Following the Restatement of Trusts, Massachusetts courts have held that a confidential relationship exists between persons when one person has confidence and trust in the other and the influence that grows out of that trust and confidence is possessed by the other. *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. 412, 444, 402 N.E. 2d 76, 94 - 96 (1980). Because of the high level of trust endowed a person who has a confidential relationship with regard to another, that person has a duty of honesty and full disclosure in business transactions. He is also "liable for concealing facts which by reason of the relationship he should disclose." *Reed v. A.E. Little Co.*, 256 Mass. 442, 449, 152 N.E. 918 (1928). The bankruptcy court found that Stevens was Elizabeth Dovydenas' spiritual advisor. It also found that their relationship was a close one and that she spent considerable amounts of time with Stevens. Moreover, the bankruptcy court found that she took Stevens' advice on many topics, such as "[m]arital, family, social, personal and financial" matters not relating to the church. 73 B.R. at 860. These facts are more than sufficient to constitute a confidential pastor/parishioner relationship.

While there is no one factor which establishes undue influence, considered together, the facts found by the bankruptcy court satisfy the legal requirements. Stevens was Elizabeth Dovydenas' pastor. She was a loyal and devoted member of the church. The bankruptcy court found that Stevens told her that her money granted her special status. *Id.* at 863. If he did not inculcate, then he reinforced her beliefs that her gifts could alter events in the world such as curing Mrs. Stevens' migraine headaches. The danger of a confidential relationship is not confined, as appellant claims, to situations in which the pastor turns his parishioner into a zombie or automaton. Rather, the

law recognizes the danger of undue influence in the pastor/parishioner relationship because of the trust instilled.

Another important factor in determining whether the influence is undue is an attempt by the influencer to isolate the donor from outside sources of advice. The Supreme Judicial Court of Massachusetts, in deciding a case of undue influence, noted that one of the factors in determining whether or not a friend of an elderly woman exerted undue influence was that "he discouraged her from having relations with her next of kin and told her that 'her relatives didn't care for her as much as he '" *Mirick v. Phelps*, 297 Mass. 250, 253, 8 N.E. 2d 749 (1937). This is consistent with the bankruptcy court's finding that Stevens isolated Elizabeth Dovydenas from her husband and family by telling her that they were motivated by Satan. He also advised her against consulting her independent lawyers and financial advisors. *Mirick*, 297 Mass. at 253. "Eventually, he succeeded in replacing them with advisors who owned their primary loyalty to him rather that the claimant." 73 B.R. at 854 - 55. These factors lead this Court to conclude appellant unduly influenced Elizabeth Dovydenas.

3. Did Elizabeth Dovydenas Submit to the Overmastering Effect of Undue Influence Exerted by Carl Stevens?

Having concluded that Elizabeth Dovydenas was susceptible to undue influence and that undue influence was exerted, this Court must next decide whether the facts found by the bankruptcy court support a determination that she submitted to the overmastering effect of the influence. This Court agrees

with appellant that the parties have not stipulated that Elizabeth Dovydenas' will was overcome. It cannot agree, however, with appellant's argument that the evidence of overmastering influence is flawed because of the bias of witnesses. Nor can it reject the bankruptcy court's findings because, as appellant argues, Stevens' statements to Elizabeth Dovydenas are "implausible." It is the role of the finder of fact to sift the plausible form the implausible. This Court has already determined that the bankruptcy court's findings of fact were not clearly erroneous, and now must apply them to the relevant legal standards.

According to the findings of the bankruptcy court, Stevens, with the help of his wife and Hill, convinced Elizabeth Dovydenas that her family and her lawyers were motivated by Satan to advise her against giving money to TBS. He convinced her that the more they protested, her gifts would have a greater likelihood of thwarting Satan. These actions alienated Elizabeth Dovydenas from her husband, family, and other sources of impartial advice. More persuasive than any of these matters, though, is Stevens' deliberate program of lying to Elizabeth Dovydenas about the effects of her donations on outside events as exemplified by the migraine and Turkia incidents. That Elizabeth Dovydenas was able to commit acts, such as lying to her father, which Stevens encouraged her to do, does not mean, as appellant asserts, that she was willful and free of influence.

Given a stipulation that Elizabeth Dovydenas was susceptible to undue influence and holding that the facts support a conclusion that undue influence was exerted, this Court concludes that the facts found by the bankruptcy judge

sufficiently prove Elizabeth Dovydenas submitted to the overmastering effect of Stevens' influence on behalf of TBS.

C. THE FIRST AMENDMENT

Appellant raises a series of objections based on the first amendment opposing Elizabeth Dovydenas' claim against TBS based on undue influence. At root, these arguments attempt to shield TBS from the consequences of Stevens' undue influence by virtue of its status as a church and Stevens' status as a clergyman. Appellant also tries to mischaracterize the case and then, based on these mischaracterizations, seeks first amendment protection. These mischaracterizations include statements that the matter is an intra-church dispute, an attempt to adjudicate the validity of a religious belief, and an attempt to stifle religious beliefs. Finally, it presents the novel argument that any words Stevens may have uttered to Dovydenas constitute "religious speech" which, appellant claims, is granted absolute protection.

The facts, as found by the bankruptcy court, show that the matter is none of these things. It is a claim by a former member of a church that she was the victim of undue influence. As such, it raises a narrow first amendment issue: were the statements found to constitute undue influence made pursuant to Stevens' religious beliefs? According to Stevens' own testimony, these statements were not reflective of Stevens' religious beliefs and thus are not protected by the first amendment.

Appellant's attempts to invoke the protection of the first amendment are, hence, based on a series of false premises. Insinuated among them is its persistent claim that it is Stevens, not Dovydenas, who is telling the truth. At one point appellant attempts to give this argument constitutional dimensions by asserting that since truth telling is a tenet of Stevens' religion, the bankruptcy court was barred from disbelieving his testimony. Appellant's claim that a minister's testimony is constitutionally protected from being disbelieved is without basis in law. In order to succeed, appellant must prove that given the facts as the bankruptcy judge found them, allowing Elizabeth Dovydenas' claim form the money she gave TBS would infringe on TBS' first amendment rights.

In determining whether or not Elizabeth Dovydenas was the victim of undue influence, this Court has relied on the findings of fact made by the bankruptcy court. Thus, to the extent that the bankruptcy court found credible Elizabeth Dovydenas' statements that Carl Stevens told her certain things, this Court must assume he did, in fact, say them unless such a finding would be clearly erroneous. Stevens' statements to Elizabeth Dovydenas are among actions attributable to him which this Court has determined constitute undue influence. As will be discussed below, his legal responsibility for making these statements will depend on the extent to which they were motivated by his sincerely held religious beliefs. Therefore, it is important to point out that the statements Stevens made, which the bankruptcy court relied on in finding undue influence, are not religious beliefs or tenets of either Stevens or TBS, according to appellant's own admissions based on the testimony before the bankruptcy court. Trial Transcripts ("T. Tr.") 6B and 12.

By identifying statements made by Stevens, which do not express religious beliefs or tenets of TBS, this Court is not engaging in its own review of TBS's theology. Rather, it is relying on the statements of Stevens and of John Leonard, the director of the Stevens Bible College, regarding their own theology. Without repeating the analysis of undue influence set out above, this Court notes that based on Stevens' and Leonard's own testimony at the hearing - - indicated by citations to the trial transcript - - the following, which the bankruptcy court found were the bases of the statements which unduly influenced Elizabeth Dovydenas, are not beliefs of TBS or of Stevens:

a) Elizabeth Dovydenas had a special calling to give money to The Bible Speaks. T. Tr. 6B at 142.

b) Giving money could bring blessings and material benefits from God. T. Tr. 12 at 204.

c) Pastor Stevens was God's man. T. Tr. 6B at 131.

d) Pastor Stevens' words were the words of God. *Id.* at 133.

e) Demons influence outsiders. *Id.* at 143.

f) Outsiders should be lied to so as to confuse the devil. *Id.* at 140 - 141.

g) There is a duty to submit to and obey Carl Stevens. *Id.* at 134.

These principles, which Stevens expounded to Elizabeth Dovydenas and which this Court has held exerted undue

influence on her, are not beliefs of TBS by appellant's own admission. 73 B.R. at 866. Therefore, actions taken or statements made espousing the above principles are not entitled to the protection of actions taken or statements made pursuant to sincerely held religious beliefs.

1. *Cantwell v. Connecticut*: Actions Taken Pursuant to Religious Beliefs

The Supreme Court in *Cantwell* held that, while religious beliefs had complete first amendment protection, conduct based on religious beliefs is subject to restriction. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), is the leading Supreme Court case regarding free exercise of religion, and presents the distinction between religious beliefs and religious conduct. In *Cantwell*, Newton Cantwell, a Jehovah's Witness, was convicted of inciting a breach of the peace by playing an anti-Catholic record on a public street corner. The Supreme Court overturned the conviction finding that playing the record was an exercise of Cantwell's religious beliefs. *Id.* at 304. Therefore, the Court held, convicting him of a breach of peace would "unduly ... infringe" his protected freedom of religion. *Id.* The Supreme Court was careful to note that it was not granting blanket protection to acts or speech motivated by religious beliefs stating that "[n]othing we have said is intended even remotely to imply that, under cloak of religion, persons may, with impunity commit frauds upon the public." *Id.* at 306. *See General Council on Finance & Administration, United Methodist Church v. California Superior Court*, 439 U.S. 1369 (1978) (Rehnquist, Cir. J.).

The holding of *Cantwell* is directly relevant to the facts here because the activity permitted the Jehovah's Witness, playing a record on a street in violation of local noise control laws, would be prohibited were it not done pursuant to an individual's religious beliefs. Equally, Stevens' conduct would be prohibited as undue influence unless it was done pursuant to religious beliefs.

2. Court's Right to Inquire into Religious Beliefs

In granting protection to actions pursuant to religious beliefs, the Supreme Court gave courts the power to determine the existence of these beliefs. Appellant, as discussed below, misinterprets *Cantwell* as a cloak protecting it from judicial scrutiny because it claims its actions were "generally" religious and were conducted by a clergyman on behalf of his church. Appellant's claims are supported by a series of false propositions, including that churches and clergymen are immune from judicial scrutiny, and that a person need not hold the religious beliefs which result in conduct in order to be protected.

In *United States v. Ballard*, 322 U.S. 78 (1974), the Supreme Court held that a court cannot assess the truth or falsity of a religious belief. A court may, however, identify an individual's religious belief when that individual has invoked them. *United States v. Seeger*, 380 U.S. 163, 185 (1965) (court could determine nature, but not validity, of religious beliefs of persons seeking military exemption). In order to allow the protection afforded by *Cantwell*, however, a religious belief must be sincerely held. Unless appellant is claiming protection for speech made pursuant to Stevens' or its own sincerely held

religious beliefs, its status as a church, or Stevens' status as a clergyman, cannot immunize it from the legal effect of those words as acts of undue influence. *See Van Schaick v. The Church of Scientology of California*, 535 F. Supp. 1125, 1142 - 43 (D. Mass. 1982). Appellant cannot, therefore, avoid this Court's inquiry into whether or not Stevens' actions were pursuant to his religious beliefs.

3. Speech Versus Action

Appellant's final argument regarding the first amendment is a deliberate distortion of the law. It claims that since the bankruptcy court found Stevens influenced Elizabeth Dovydenas through statements he made to her, holding Stevens liable for undue influence would be an impermissible restriction of religious speech. This is because the speech took place in the context of a pastor "[preach]ing to members of his flock." Appellant's Brief at 13. However, since this Court has determined that the statements made by Stevens to Elizabeth Dovydenas which constituted undue influence were not pursuant to his religious beliefs, those statements cannot constitute "preaching" in the sense that they are protected as expressions of religious beliefs.

Underlying appellant's distortion of first amendment law is a more serious attempt to immunize Stevens from the consequences of his undue influence by offering a spurious distinction between speech and action. Although appellant argues that the "means [of exerting influence] was speech" and thus entitled to greater first amendment protection than that afforded to conduct under the first amendment, appellant's reliance upon a speech/conduct distinction in this case is

misplaced. It is misplaced because as constitutional scholar Laurence Tribe explains, "[a]ll communication except perhaps that of the extrasensory variety involves conduct." Tribe, *American Constitutional Law* 599 (1978). The issue, then, of whether the appellant is entitled to protection under the first amendment does not depend upon whether Stevens' statements to Elizabeth Dovydenas constituted speech or conduct, but rather whether his statements were expressions of sincerely held religious beliefs.

As applied to Stevens, then, the extent to which he is protected by the first amendment for his speech to Elizabeth Dovydenas is one of mere academic interest because this Court has already determined that his undue influence was not motivated by his religious beliefs. Therefore, whether that influence was by word or deed, it is afforded no special protection. While the first amendment protects a wide variety of speech and actions, it is not an absolute shield for wrongdoers from the legal consequences of their conduct. Since Stevens could not show that he exerted undue influence pursuant to his religious beliefs, he cannot claim first amendment protection for his conduct.

4. Not an Imposition of State Values

In holding that Stevens' actions are not protected by the first amendment, this Court is not weighing the state's rights against the debtor's. Rather, it relies on the debtor's own statement that its acts were not pursuant to its religious beliefs. Thus, this Court is not invoking the "*Reynolds*" exception to the free exercise clause. *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the Supreme Court held that even though

polygamy was a sincerely held Mormon belief, a state's interest in the sanctity of marriage outweighed the Mormons' right to practice polygamy. *Reynolds*, 98 U.S. at 164. The Court did not, of course, infringe upon their right to belief in polygamy. This doctrine has been applied sparingly and only in cases where health and safety are endangered. *See Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (although wearing of a yarmulke is part of Jewish religious observance, necessity of maintaining military discipline requires that it could not be worn if violative of Air Force dress code). This doctrine is not applicable here. The issue is not that a state interest outweighs Stevens' right to commit actions stemming from his religious beliefs. The point, rather, is that Stevens was not acting pursuant to his religious beliefs when he made the statements which unduly influenced Elizabeth Dovydenas.

5. Clerical Immunity

Finally, neither churches nor clergymen are immune from judicial scrutiny. *See General Council on Finance & Administration, United Methodist Church v. California Sup. Ct.*, 439 U.S. 1369 (1978) (Rehnquist, Cir. J.) (Justice Rehnquist refused to grant a stay in an action against a church for breach of contract, fraud and violation of security laws); *Cantwell v. Connecticut*, 310 U.S. at 306; *Kedroff v. St. Nicholas Cathedral for the Russian Orthodox Church in North America*, 344 U.S. 94, 120 (1952); *Van Schaick v. the Church of Scientology of California, Inc.*, 535 F. Supp. at 1125. The Anglo-American legal system has long confronted the problem of undue influence exercised by a clergyman or spiritual advisor. In *Huguenin v. Busely*, 14 Ves. Jr. 273, 33 Eng. Reprint 526, 6 ERC 834 (1807), 14 A.L.R. 2d 652 (1949), the court set aside a voluntary

settlement made by a widow upon a clergyman who persuaded her to transfer the management of her affairs from her lawyers to him before making the gift. *See generally* Annot., *Undue Influence in Gift to Clergyman, Spiritual Adviser, or Church*, 14 A.L.R. 2d 649 (1949).

More recently, Justice Rehnquist, acting individually, denied a church's application for a stay pending a review on *certiorari*. *General Council on Finance & Administration, United Methodist Church v. California Superior Court*, 439 U.S. at 1369. The church was a defendant in a class action. The class was seeking damages for breach of contract, fraud and violations of state securities laws by a non-profit organization which was found to be the alter ego of the church. In rejecting the church's claim for religious immunity, Justice Rehnquist stated:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastic cognizance and policy in adjudicating intra-church disputes. But this court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, [cases regarding intrachurch disputes] are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

Id. at 1372 - 73 (citations omitted).

This district has applied the holding of *United Methodist Church* in denying a church's claim that its actions, which the plaintiff alleged included fraud and infliction of emotional distress, could not be reviewed because they were protected by the first amendment. In *Van Schaick*, the court wrote:

> [E]ven if we were to find that the California Church is a religious institution, the free exercise clause of the First Amendment would not immunize it from all common-law causes of action alleging tortious activity. Causes of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose.

Id. at 1134 (citations omitted). This Court's right to review is even stronger here where the church was not acting upon a religious belief but merely claims protection based on its status as a religious institution.

Making first amendment arguments does not, obviously, create a first amendment issue. The Supreme Court has specifically held that status as a religious institution or clergyman does not confer immunity from tortious activity. Since this Court has determined that Stevens' statements to Elizabeth Dovydenas constituted undue influence, his only possible first amendment defense could be that his statements were made pursuant to his religious beliefs. Since appellant admits that Stevens' statements were not made pursuant to his religious beliefs, they are not protected by the first amendment. Having reviewed its findings of law *de novo*, this Court upholds the

bankruptcy court's judgment and allows Elizabeth Dovydenas' claim against The Bible Speaks in the amount of $6,581,356.25.

D. MOTION FOR SUMMARY JUDGMENT

Finally, appellant appeals the bankruptcy court's denial of its motion for summary judgment issued on February 9, 1987. Since the denial of the motion was an interlocutory order, this is the appropriate time to file an appeal.

To survive a motion for summary judgment, the non-moving party must set forth evidence from which a jury might return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2514 (1986). Further, when considering a motion for summary judgment, this Court must view the facts and all reasonable inferences to be drawn from them in the light most favorable to the non-moving party. *Ismert & Associates, Inc. v. New England Life Insurance Company,* 801 F. 2d 536, 537 (1st Cir. 1986). Appellant claims in its motion that Elizabeth Dovydenas should not prevail because she has violated the tax code and filed a false claim against TBS' estate. Appellant in its briefs before this Court presents two different arguments for the granting of summary judgment. Since appellant's arguments in its first brief approach the inscrutable, this Court relies on the somewhat more lucid restatement for "clarity" in its reply brief. Appellant's Reply Brief at 15.

Briefly, appellant's arguments stem from Elizabeth Dovydenas' joint 1985 tax return. On the return, filed after she entered her petition in the current matter, she declared the

$585,647 which she had given to TBS that year as a charitable contribution pursuant to 26 U.S.C. § 170. The prior year Elizabeth Dovydenas also claimed the $1,001,031 she gave to TBS as a charitable contribution pursuant to 26 U.S.C. § 170. Appellant states, correctly, that in order for a charitable contribution to be deductible from income under 26 U.S.C. § 170, the charity must be eligible to receive such gifts pursuant to 26 U.S.C. § 501 (c) (3) and the donor must have no expectation of recovering her money. This Court also agrees with appellant that 18 U.S.C. § 152 makes it a crime to file a false claim in a bankruptcy proceeding.

It is at this point that appellant's argument strays into novel territory. Appellant claims that since TBS is eligible to receive deductible donations under section 501 (c) (3), Elizabeth Dovydenas' claims of those donations under section 170 constitute statements under oath that she had no expectation of recovering the money. Thus, continues the argument, Elizabeth Dovydenas should nor recover the money because: 1) by categorizing the money she gave to TBS as a deduction against her taxable income, she swore she had no right to it and thus her claim against the estate is false, and/or 2) by filing a claim against the estate for recovery of the money she gave to TBS she swore she had a right to recover it and thus her income tax return is false.

Appellant also argues that Elizabeth Dovydenas should not recover because section 501 (c) (3) of the tax code prevents the income of a charitable organization from inuring to a private individual. This argument is a dangerously incorrect interpretation of the tax code. There is no support for appellant's claim that section 501 (c) (3) protects charitable

organizations from having judgments entered against them and, therefore, this Court rejects appellant's argument.

Appellant's argument that Elizabeth Dovydenas is guilty of a felony either because of her 1985 tax return or her claim in bankruptcy would be more appropriately brought before the Internal Revenue Service or the United States Attorney rather that this Court. Viewing the facts in the light most favorable to the non-moving party, this Court notes that Elizabeth Dovydenas disclosed on her 1985 tax return the circumstances of her impending claim against TBS. Thus, she alerted law enforcement officials of her actions. There is no provision of the tax or bankruptcy code which requires this Court to disallow Elizabeth Dovydenas' claim. More importantly, the factual disputes between the parties make this case inappropriate for summary judgment. *See Kennedy v. Josephthal & Co.*, 814 F. 2d 798, 803 - 04 (1st Cir. 1987). Thus, the bankruptcy court's denial of appellant's motion for summary judgment is upheld and the motion will be denied.

V. CONCLUSION

Having found the bankruptcy court's conclusion that debtor-appellant TBS exerted undue influence which resulted in gifts of $6,581,356.26 by the claimant-appellee is not clearly erroneous, the judgment of the bankruptcy court dated May 19, 1987 is hereby AFFIRMED. Appellant's motion for summary judgment dated February 9, 1987 is DENIED.

It is So Ordered.

s/ Frank H. Feedman
Chief United States District Judge

APPENDIX C - JUDGMENT AND OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS [PP. 84a - 134a]

United States Bankruptcy Court
District of Massachusetts

In re	)	
	)	Chapter 11
THE BIBLE SPEAKS,	)	Case No. 86-40392-JFQ
	)	
Debtor	)	

JUDGMENT ALLOWING CLAIM OF ELIZABETH DOVYDENAS

The claim of Elizabeth Dovydenas is hereby allowed in the sum of $6,581,356.25.

At Worcester, the 19th day of May, 1987.

s/_____
James F. Queenan, Jr.
U. S. Bankruptcy Judge

APPENDIX C

[Opinion and Order - Bankr. D. Mass. 1987]

United States Bankruptcy Court
District of Massachusetts

In re	)	
	)	Chapter 11
THE BIBLE SPEAKS,	)	Case No. 86-40392-JFQ
Debtor	)	

OPINION ALLOWING CLAIM OF ELIZABETH DOVYDENAS

Elizabeth Dayton Dovydenas (the "Claimant") seeks the return of several large contributions made to The Bible Speaks (the "Church"). The Church is a debtor in this Chapter 11 proceeding primarily because of this claim, having prevailed in its opposition to the Claimant's motion to dismiss the proceeding. *See In re The Bible Speaks*, 65 B. R. 415 (Bankr. D. Mass. 1986). The Court has conducted a three week trial of the claim, after extensive discovery proceedings by both parties that produced much acrimony. By separate judgment, the Court has today allowed the claim in the sum of $6,581,356.25. This is a case of undue influence exerted upon a church donor which appears to be unsurpassed in our jurisprudence in its variations and in the sums involved. Revealed is an astonishing saga of clerical deceit, avarice, and subjugation on the part of the Church's Founder, Carl H. Stevens. He has abused the trust of the Claimant as well as the trust of many good and devout members of the Church. This is also, apparently, one of the few restitution cases brought by a church donor where First Amendment issues have been fully briefed and argued by the parties. We set forth here findings of fact and conclusions of law in support of the judgment allowing the claim.

I. PRINCIPAL SUBSIDIARY FINDINGS OF FACT

A. THE PARTIES

The Church is an evangelical, Bible-believing fundamentalist Christian church. It enjoys corporate tax exempt status as a religious and educational organization. It has about 1,200 parishioners and supports missionary work in numerous foreign countries. The Church operates The Stevens School of the Bible, which enrolls some 600 adults, many of whom board at the school, and a private day school for children in kindergarten through the twelfth grade, which enrolls about 300 students. It conducts a daily radio program in the form of an hour-long "talk show" concerning religious education, which is broadcast throughout the country. The Church has a cooperative relationship with a number of autonomous religious organizations located in this and other countries, called "affiliated ministries," which also use the name "The Bible Speaks." The Church owns extensive real estate in Lenox, Massachusetts, which was formerly occupied by a college preparatory school for boys. The church moved its principal operations to Lenox from South Berwick, Maine in 1976.

Carl H. Stevens ("Stevens"), age 57, founded the Church in 1973. He is its Pastor and President, and at all material times has been its chief executive and chief operating officer. Stevens is articulate and mild in manner, by he can at times fulminate from the pulpit in the style of a Cotton Mather. He has a commanding presence in private. Although Stevens has basically no formal education, he has taken courses at Moody Bible Institute. He holds an honorary degree from Clarksville Theological Seminary, for which the Church paid a "processing" fee.

APPENDIX C

[Opinion and Order - Bankr. D. Mass. 1987]

The Claimant, age 34, is an intelligent college graduate who has taken post-graduate courses in art. She is an attentive mother, and a trusting and dependent person. She is in excellent health and enjoys many of the simple aspects of life, such as camping, horses and dogs. She has continued her interest in art. The Claimant is a descendent of the founders of the Dayton Department Stores, now operated by Dayton-Hudson Corporation ("Dayton-Hudson"). She grew up in a suburb of Minneapolis, and came into substantial wealth at an early age. Prior to her involvement with the Church, her net worth was approximately $19 million. In 1978, she married Jonas Dovydenas ("Jonas"), who was then working as a free lance photographer in Chicago. He is some 14 years older than the Claimant, and is a very capable individual.

The Claimant and Jonas began their married life in Chicago. After the birth of their first child, they desired a country setting to raise their family. In 1981, they moved to Lenox, Massachusetts, a cultural town in the picturesque Berkshire Mountains. Neither Jonas nor the Claimant had any previous close association with that area. They were very much in love and happy in all aspects of their married life. They were particularly relaxed concerning their respective roles in family finances. The income from the Claimant's investments was of course more than enough to support them. They had agreed early in their marriage that it made no sense for Jonas to attempt to earn enough for their joint support. In Lenox, Jonas continued his activities as a free lance photographer, although these became less extensive because of his involvement in various projects improving their substantial property there.

B. BEGINNING OF CLAIMANT'S RELATIONSHIP WITH THE CHURCH AND STEVENS

The Claimant was raised in a Presbyterian family, and Jonas in a Catholic family, but neither attended these churches regularly as adults. After moving to Lenox, they attended a few different churches before settling on the Church in 1982. The Claimant was attracted to the Church by the large and enthusiastic crowds at its services, as well as by the relative youth of its parishioners. After attending several services, they left a $600 check in the basket. This generosity precipitated a travail for their marriage.

Shortly thereafter, two ministers of the Church appeared, uninvited, at the Claimant's home. They asked whether Stevens could visit the Claimant, and she consented. Stevens's secretary called, and the Claimant invited him to tea. Stevens was then a widower; he came accompanied by Barbara Baum ("Baum"), whom he was dating and whom he married in 1984. During that first visit he asked the Claimant and Jonas, separately, if they had accepted Jesus Christ. Each replied in the negative. The Claimant was embarrassed by the question. Baum, who is the Claimant's age, expressed her desire during that visit to get to know the Claimant better.

Baum and the Claimant soon became good friends, and the Claimant began spending more time in the activities of the Church. Sometime later Baum introduced the Claimant to Kathleen M. Hill ("Hill"), who was also about the Claimant's age. Hill was employed as a bookkeeper by the Church and lived on the Church's property. She was close to both Stevens and Baum. Hill also became very friendly with the Claimant, and spent an increasing amount of time with her in church and social activities.

In mid-1983, the Claimant had a conversation with Baum and Stevens in Stevens's office, in which for the first time the Claimant affirmed to Stevens that she was a "born again Christian." Stevens then asked her to pray for Jonas, who had not made this affirmation. He told the Claimant that Jonas was in the Kingdom of Darkness because he was not yet "born again" through the Church. This statement caused the Claimant grave concern, and she began to view Jonas as one controlled by the Devil. Her changing view of Jonas was the beginning of a growing estrangement between them. The Claimant thereafter increased the amount of time she spent with Stevens and in the activities of the Church. She had numerous private counseling sessions with Stevens, attended daily Bible classes and daily "rap sessions" that he conducted, and occasionally traveled to Framingham with him, where he delivered a sermon on Friday nights.

The Claimant's confidential relationship with Stevens, her psychological make-up, and his role in her marital strife will be more fully described later. It suffices to state here that she disclosed to Stevens the details of her wealth, as well as essentially all other personal matters. Stevens told her, in substance, on numerous occasions that: giving money to the Church was her primary mission on earth; all she needed to live on was $1 million, and the rest should be given to the Church; she should not be influenced by her husband, or her parents, sisters or advisors, because they have not been "born again" through the Church and are therefore controlled by the Devil; and her money gave her the power to release God's judgment in order to effect miracles. The Claimant accepted and believed all of this.

C. THE $1 MILLION GIFT

Baum suffered from severe migraine headaches, which frequently incapacitated her. In November of 1984, shortly before Stevens and Baum were married, the Claimant told them, separately, she had received a message from God that she should give $1 million to the Church in order to cure Baum's migraine condition. Stevens and Baum were delighted, and urged her to do this. The Claimant got this notion because Stevens had convinced her that she was a special person who could release material benefits from God though gifts to the Church. The idea first came to her in October of 1984 when Stevens said to her, while they were in a car together driving from an evening church service of an affiliate in another city, that it "seems" she had been hearing from the Holy Spirit. The Claimant's normal annual gifts to charities had been about $10,000 per year, except in 1977 when she gave $127,000 to the Minneapolis Art Center. When the Claimant informed Jonas of her intention to make the $1 million gift, he said he thought the idea of giving that amount away in one fell swoop was "crazy." He urged her to consult with the legal and financial advisors whom they and other members of the Dayton family had employed for years. She refused. Jonas then contacted Okabena Company ("Okabena"), the family's financial advisor located in Minneapolis, and asked for its advice concerning the gift.

On November 20, 1984, Okabena sent a three page memorandum to the Claimant and Jonas discussing the relative economic and tax benefits from three alternative methods of making the $1 million gift: an outright gift in 1984; a gift in installments over six years; or the creation of a charitable income trust. Okabena pointed out in the memorandum that an outright gift in 1984 was disadvantageous from a tax point of view because the Claimant would be unable to deduct the full

amount from her taxable income, due to annual limitations on charitable deductions.

The Claimant did not wait for this advice before making her decision. On November 20, 1984, she sent a letter to Okabena directing it to transfer $1 million of Dayton-Hudson stock to the Church in December. When she later received the Okabena Memorandum of November 20th, she did not discuss it at any length with Jonas. She did, however, show it to Stevens and asked him for his thoughts. He told her to disregard the Okabena advice because it was the work of the Devil, and to proceed with the gift. On December 14, 1984, Okabena brought about the transfer from the Claimant to the Church of 31,200 Dayton-Hudson shares at a value of $1,001,031.25. The Claimant did this over the objection of Jonas who thought she should follow Okabena's advice.

D. THE $5 MILLION GIFT

Thereafter, Stevens and Baum (who by then was Mrs. Stevens) told the Claimant that Baum's migraine condition had been cured by reason of this gift. To the contrary, Baum continued to suffer from the condition and it required her to be hospitalized in January of 1985. Stevens and Baum nevertheless deceived the Claimant into thinking that the condition had been cured, and she believed this at all material times. Their purpose was to further promote the claimant's notion that she was a special person anointed by God to promote good though gifts of her money to the Church.

In early April of 1985, the Claimant informed Stevens that God had told her to make a $5 million gift to the Church in the following June. Stevens again expressed delight, and told her not to inform anyone of her intention, especially Jonas. She

agreed to comply with this direction. For some time Stevens had harbored the ambition to become a television evangelist. He and the Claimant had discussed the possibility of the Church becoming a television ministry. The Church had long-range building plans which included conversion of a skating rink into a large new chapel, and the construction of television production facilities, as well as a swimming pool. Upon receiving news of the forthcoming $5 million gift, Stevens immediately began finalizing these plans. He also began planning to have the Church purchase a condominium for his personal use in Palm Beach, Florida.

On April 18, 1985, the Claimant and Jonas left with their two children for Sanibel Island, Florida to join the Claimant's parents and sisters in celebrating her mother's birthday. On that morning, before they left, Baum called the Claimant to inform her that Benjamin Turkia ("Turkia"), one of the Church's ministers, was imprisoned in Romania, and to ask the Claimant to pray for him. She said the Claimant: "They are probably pulling out his fingernails right now." In fact, Turkia had been detained by Romanian border guards for only 24 hours, and had been released on April 17th. He arrived in Budapest, Hungary on April 17th at 8:00 P.M. Budapest time, at which point his companion placed a call to a friend in Pennsylvania informing him of what had happened and requesting him to call Turkia's wife. Turkia's wife was immediately informed of the detention and release. She was then living in Lenox in the home of Edward Canino ("Canino"), an employee of the Church. On April 18th, after her phone conversation with Baum, the Claimant telephoned Okabena to inform it of her intention to give $5 million to the Church.

On April 21st, Jonas left Florida to return to Lenox and the Claimant remained there with her two children for a few days. On the evening of April 21st, the Claimant called

Stevens in Lenox to inform him that she had decided to make the $5 million gift immediately rather than in June. She said she wanted to do this in order to obtain Turkia's release. Stevens replied "Good-get a jump on the Devil." Stevens encouraged her in her belief that the gift had the power to effect Turkia's release. On April 22, 1985, the Claimant wrote to Okabena from Florida and directed Okabena to transfer $5 million of Dayton-Hudson stock to the Church. Shortly after the Claimant returned from Florida, she learned that Turkia was free and had joined his wife in Lenox. She concluded that his release was brought about by her declared intention to make a gift for that purpose, and resolved to go ahead with the gift immediately. Stevens, Baum and Hill encouraged her in this thinking, and they again urged her not to tell Jonas, Turkia, or anyone else about the gift, with the exception of Okabena whose services in the transfer were necessary.

In the evening of April 27th, Stevens met with the Claimant and told her, in Hill's presence, that she should write a letter to him expressing her intentions concerning the $5 million gift; he told her a number of things to say in the letter. On April 28th, Hill dictated the letter to the Claimant from notes Hill had taken during the prior conversation with Stevens. The Claimant wrote down all that she was told, and gave the letter to Hill. This April 28th letter contains statements that no one from the Church had asked her to make the gift or knew of her intention to make the gift, and that she had never been "pressured into giving money in any way either publicly or privately." These statements were false and served only Stevens's interests. At about the same time, Stevens suggested to the Claimant that she get a new post office box and direct Okabena to send all mail there, so that Jonas would not discover what was going on. The Claimant immediately did this. She also directed Okabena not to call her at home.

Bruce Dayton, the Claimant's uncle, was the head of Okabena. In late April, he informed Wallace Dayton, who is his brother and the Claimant's father, of the planned $5 million gift. He did this at least in part because of his concern that s subsequent sale of the stock by the Church could have an adverse effect upon its value. Wallace Dayton was not told of the previous $1 million gift, and he was not then aware of that prior gift. News of the intended $5 million gift disturbed him. He telephoned the Claimant on April 30th, and started to express his concern and his desire to come to Massachusetts to discuss the matter. She put him off and asked him to call her back later that evening. The Claimant then called Stevens and told him of her father's call. Stevens told her to lie to her father, to tell him that the gift was to be in an amount that was nowhere near $5 million. Stevens told the Claimant that Jonas must not overhear this conversation, so that it was important that Jonas be out of the house when Wallace Dayton called back. He arranged for Canino to invite Jonas out for dinner that evening, and Jonas accepted the invitation. When Wallace Dayton called back, the Claimant did as she was told, deceiving her father of her intentions. In his words, "she disarmed me." In that conversation, and in another the next day, the Claimant declined to see her father. He let the matter drop at that point; he learned of neither the $1 million gift nor the $5 million gift until the following November.

Okabena, in the meantime, had forwarded the Claimant a stock power which the Claimant signed on May 1st and returned to Okabena. On May 9th, Okabena sent to a transfer agent the executed stock power with stock certificates representing 125,400 shares of Dayton-Hudson stock having a value of $5,000,325.00, and requested the agent to transfer the stock to the Church, which was done. Jonas left in early May on a photography trip to Pakistan. Before he left, he suspected that the Claimant was going to make another sizable gift to the

Church, but he didn't learn of the $5 million gift until the following December.

The Church sold the stock received in this gift. These funds enabled it to convert its skating rink to a beautiful chapel, to pay off a large mortgage, to construct a swimming pool and to make a number of expenditures in furtherance of its religious and educational goals. The chapel was equipped with a closed circuit television system which permitted services to be viewed from elsewhere within the Lenox complex. The funds also enabled the Church to purchase and furnish a condominium in Palm Beach at a cost of $320,875. This purchase was made for the personal use of Stevens and Baum. No one else has ever used the property, nor has there been any attempt to rent it. The Claimant was never informed of the intention to make this purchase or of the fact that it was made.

During the period from about April 27th to May 9th, Stevens and Hill caused the Claimant to make about six telephone calls to Okabena in order to expedite the transfer. Canino also spoke to Okabena for the same purpose. Stevens and Hill told the Claimant what to say to Okabena, and they advised her to be "aggressive." On several occasions Hill, at Stevens's direction, was on an extension line listening to the conversation. The personnel at Okabena to whom the Claimant spoke during these conversations merely accepted her directions, and did not take any position against the gift. The Claimant had no conversation concerning the matter with her uncle, Bruce Dayton.

E. TERMINATION OF RELATIONSHIP WITH OKABENA

The Claimant was angry that Okabena, through her uncle, had divulged her plans to her father. She regarded this as a breach of Okabena's obligation of confidentiality. She was encouraged in this attitude by Stevens, Baum and Hill. Stevens indicated to her that this action by Okabena was an example of the Devil seeking to frustrate God's work. She accepted this characterization of Okabena. Stevens told the Claimant that she should change financial advisors. He recommended James Freed of Dean Witter Reynolds Inc. ("Dean Witter"), whom the Church had recently employed to give it advice in the investment of its new wealth. The Claimant readily agreed to meet with Freed. Stevens informed Freed of this, giving Freed information concerning the Claimant's wealth, including her substantial holdings in Dayton-Hudson. He told Freed of the possibility of further gifts from the Claimant to the Church.

Stevens arranged a meeting in his office between the Claimant and Freed on July 9th. At that meeting, Freed, rather than first asking the Claimant what her investment goals were, began talking about the income disadvantages of Dayton-Hudson stock compared to tax free bonds. The Claimant at no time had as her investment goal the obtaining of maximum income as opposed to capital appreciation. On July 12, 1985, in a letter to Stevens with no copy to the Claimant, Freed outlined his thoughts concerning the Claimant's investments, again recommending replacement of Dayton-Hudson stock with tax free bonds. At the end of that letter he stated that the Claimant "may want to set up a trust account in which The Bible Speaks holds the investment and mails her the interest." On July 20, 1985, the Claimant opened on account with Dean Witter. She directed Okabena to cease all investment activity on her behalf and to transfer all of her assets to the control of

Dean Witter. In the succeeding months, agency control over the bulk of the Claimant's assets was transferred from Okabena to Dean Witter. At the direction of Stevens, the Claimant concealed all of this from Jonas. For example, Hill and the Claimant picked September 14th to meet with Freed at his office in New Jersey because Jonas was attending a wedding on that Saturday. In October of 1985, Freed caused the sale of over $5 million of Dayton-Hudson stock. He advised the Claimant that this sale would not bring about any tax liability because of her charitable gifts. In fact, the Claimant has been assessed a substantial tax as a result of the transaction.

F. THE 1985 WILL

In June of 1985, Stevens convinced the Claimant that she should get a new lawyer to draw a will and assist her in terminating the Okabena agency arrangement. The Claimant's attorney at that time was the one who had drawn her existing will and codicils. He was a partner in the Chicago law firm of McDermott, Will & Emory, and was experienced in estate planning. That firm also represented several of the members of the Dayton family. On July 1, 1985, Stevens brought the Claimant to meet Andrew Campoli ("Campoli"), a Pittsfield general practitioner who had very limited experience in drafting even simple wills. He was on an annual retainer from the Church. With the assistance of a few other lawyers, he was then doing all or substantially all of the Church's legal work, including both corporate matters and trials. Campoli also represented Stevens personally and a number of the Church's parishioners. He did not himself attend services at the Church.

During the next six months, the Claimant and Hill made about a dozen visits to Campoli's office to discuss the will and the termination of the agency arrangement with Okabena.

Hill always accompanied the Claimant, pursuant to the directions of Stevens. Stevens had designated her as the Claimant's "covering," meaning that she was to keep him informed of the Claimant's activities. She kept Stevens fully apprised of what transpired at these sessions. Her constant presence was never explained to Campoli, and he never objected to it. Campoli was aware at an early date that the Claimant intended to make the Church the principal beneficiary of her estate. The Claimant knew that he represented the Church on a continuing basis, but at no time did Campoli make disclosure to the Claimant of the possible effect that his representation of the Church could have upon the exercise of his independent judgment on her behalf.

The Claimant furnished Campoli with a copy of her March 31, 1981 will and two codicils thereto, one executed March 31, 1981 and another executed on December 19, 1983. These instruments contained a $2 million bequest to an existing intervivos trust for the benefit of the Claimant's children, and a few other bequests. One-half of the residue of the Claimant's estate was left to Jonas outright. The remainder went to a general charitable trust whose trustee (a sister of the Claimant) had discretion to select the charitable beneficiaries. Campoli was informed that there were intervivos trusts in existence for her children, but he did not inquire as to the value of their corpus.

Hill took an active role in all conversations concerning the will. Four of these sessions were taped at Stevens's suggestion. Hill and the Claimant told Campoli that the Claimant wanted to leave Jonas only what the law required. They informed Campoli that the Claimant's marriage was strained, but that she had no present intention of obtaining a divorce. He was also aware that the Claimant's involvement with the Church was at least a part of her marital problem.

The Claimant and Hill told Campoli that the Claimant wanted to leave her children only her jewelry. This was the Claimant's desire because Stevens had convinced her of the unimportance of children having property in view of the impending second coming of Jesus Christ. She had previously made substantial annual gifts to her childrens' trusts, but had ceased this practice at Stevens's suggestion.

On December 13, 1985, the Claimant executed a new will drawn by Campoli, leaving Jonas $25,000 outright plus the right to receive income from the balance of one-third of her estate, which was to be held in trust for his benefit during his lifetime. This was the minimum amount she could leave him under Massachusetts law. The will gave only jewelry to the Claimant's children, with the explanation that "they have otherwise been generously provided for during my lifetime." The Church was left the entire residue of the estate, including the trust remainder at Jonas's death. Stevens, at Campoli's suggestion, was named the sole trustee of Jonas's trust. Hill was named executor. The will contained a direction that Stevens manage the "financial affairs" of the estate. In the event that Stevens predeceased the Claimant, this function was to be performed by seven individuals associated with the Church, including three of Stevens's children, his son-in-law, and Hill. Hill and her husband were named as alternate guardians of the Claimant's children, in the event of the prior death of Jonas. The executor was directed to have Campoli handle the estate's legal affairs. At no time did Campoli raise any issue concerning the wisdom of this entire dispositive scheme, other than to voice a mild objection to the unwieldy plan to have seven people involved in the management of the "financial affairs" of the estate if Stevens didn't survive. The dispositive scheme was dictated to him by the Claimant and Hill.

G. DAYTON FAMILY'S DISCOVERY OF THE $5 MILLION GIFT

During November 4 - 6, 1985, the Berkshire Eagle, the local newspaper, published three articles which were highly critical of the Church, based on a six month investigation by the newspaper. These articles have been taken in evidence only for the fact of their publication, and not for the truth of the statements made. Because the articles had consequences in this case, we briefly summarize their content. The Eagle cited instances of financial exploitation and manipulation of Church members. It referred to the Church's "cultist characteristics," although conceding that its members were earnest and dedicated Christians. The articles were particularly critical of alleged extreme exaltation of Stevens in the Church, and they contained criticisms of him and the Church by a number of dissident former members, including one of Stevens's sons. The articles made no mention of the Claimant.

Jonas at this time was out of the country on another sustained photography trip. His father sent copies of the Eagle articles to Wallace Dayton, the Claimant's father, who circulated them among family members. The family was greatly disturbed, and in their discussions they learned from Okabena of the $5 million and $1 million gifts. They pleaded with the Claimant by telephone to re-examine her relationship with the Church, to no avail. Jonas returned in early December. He was informed of the $5 million gift, but he was also unsuccessful in bringing about a change in the Claimant's attitude toward the Church.

H. THE $500,000 GIFT

Unknown to Jonas or the others, the Claimant at this time had decided to make another large gift to the Church. On December 3, 1985 she wrote a $500,000 check payable to the

Church on a Dean Witter check which bore her name. She then wrote a note to Stevens telling him that she had been "led by God" to make this gift to enable the Church to have television equipment "like PTL," and inquired whether this would make television specials possible. Hill persuaded the Claimant not to deliver the note and check, and to instead make the gift anonymously. Stevens's latest ploy was to pretend that the Church would take no more gifts from the Claimant without the consent of Jonas. It was thus necessary to make the gift appear to be anonymous, and to try to insulate Stevens from it.

The Claimant therefore voided the $500,000 personal check, and delivered to Hill a Dean Witter Cashier's check payable to the Church in the sum of $500,000 and Dated December 12, 1985. Hill delivered this check to the Church with an anonymous, typed note directing that the funds be used for the production of television specials. This check was promptly cashed. The Church has offered testimony seeking to persuade the Court that Stevens then knew only that a substantial gift had been made anonymously. Stevens was not only cognizant of the gift from the beginning, he devised the entire charade in an attempt to hide the gift and his involvement in it. This was part of the damage control activities which he felt were necessary by reason of the Berkshire Eagle articles. The taping of the Campoli sessions was another "damage control" activity.

I. OTHER GIFTS

The Claimant made additional gifts to the Church by check in the latter part of 1985. Their dates and amounts are as follows: $14,000 in July 1985; $50,000 in September 1985;

$10,000 in October 1985; and $4,000 and $2,000 in November 1985. She also gave Stevens $10,000 in cash in November 1985.

J. EXIT COUNSELING AND SUBSEQUENT EVENTS

The Dayton family decided in December that something should be done to try to have the Claimant make an objective analysis of her involvement with the Church. They were gravely concerned about what appeared to be an entire change of personality on her part. They were advised by a doctor to obtain professional exit counseling for the Claimant, and to consider a conservatorship as another step. They and Jonas accepted this advice. They retained two exit counselors, and they decided not to be forthright with the Claimant as to their plans.

The family invited the Claimant to come to Minnesota on the pretext that there was to be a celebration of her father's birthday; the Claimant went there with Jonas in January believing this ruse. The family had rented a house where the party was supposedly to take place. It was not until the Claimant arrived at that house that she was informed of the true purpose of the gathering. She stayed in the house for about a week with Jonas, her parents, her three sisters, brothers-in-law, and the two exit counselors. She was never physically prevented from leaving. She had numerous, often emotional discussions with her family and Jonas, and spent a few hours each day with the exit counselors. The exit counselors spoke with her about psychological aspects of organizational membership. They also showed her video tapes concerning various cults, including the group involved in the Jonestown tragedy.

The Claimant was initially shocked and annoyed. She told her family that her religious views were very important to her, and they assured her that they were not concerned about her religious views. They told her they had grave concerns about what they regarded as a virtual transformation of personality on her part. After several days, the Claimant gradually came to her senses about Stevens. The turning point came when she was able to take an objective view of a conversation she and Jonas had with Stevens at the end of December. Jonas had confronted Stevens and asked him whether he had accepted any substantial gifts after the $1 million gift, not disclosing to Stevens that he then knew of the $5 million gift. Stevens put his hand on a Bible and swore that the Church had not received any additional gifts. The Claimant at the time knew he was lying, and yet she believed him. When she realized the enormity of that deviant thinking, she knew that she needed help. Toward the end of the week the Claimant signed a new will leaving her estate to Jonas and her children, and naming her father and Jonas as executors.

After about a week at the rented house in Minneapolis, the Claimant and Jonas spent a few more weeks in Iowa where she received additional exit counseling, and they then returned to Lenox. The Claimant consented to the institution of a temporary conservatorship proceeding in a Massachusetts court. Her father and a bank were appointed temporary conservators. That conservatorship expired in April of 1986. On April 14th, the Church filed a complaint in a state court seeking damages and a declaratory judgment that the gifts were not the result of fraud or undue influence. This suit was dismissed by memorandum decision entered on June 13, 1986. The Claimant then brought suit in the same state court seeking damages and rescission based upon lack of donative intent, undue influence and fraud. The Church responded by instituting the current Chapter 11 proceeding in this Court, and it

prevailed in its opposition to the Claimant's motion to dismiss this proceeding.

The foregoing sets forth many of the Court's subsidiary findings of fact. Many of the findings are based upon the testimony of the Claimant and Jonas, who were forthright and credible. Stevens, Baum and Hill gave quite a different version of the facts. Their testimony, however, was evasive and lacking in credibility. It also conflicted with much undisputed documentary evidence. Additional subsidiary findings, as well as general findings, appear in succeeding portions of this opinion. We now turn to the governing legal principles.

II. UNDUE INFLUENCE

A. General Principles of Law

Case law in Massachusetts on undue influence is extensive. Findings of undue influence have invalidated bequests in wills, *e.g., Erb v. Lee*, 13 Mass. App. Ct. 120, 430 N.E.2d 869 (1982); *Hoffman v. Hoffman*, 192 Mass. 416, 78 N.E. 492 (1906), codicils to wills, *Reilly v. McAuliffe*, 331 Mass. 144, 117 N.E. 811 (1954), and intervivos gifts. *McDonald v. McNeil*, 300 Mass. 350, 15 N.E.2d 460 (1938). Massachusetts courts have indicated that contracts and trusts may be voided because of undue influence. *See Bruno v. Bruno*, 384 Mass. 31, 422 N.E.2d 1369 (1981) (adopting test in *Restatement (Second) of Contracts* §177(1) (1981) for undue influence in contracts); *Marshall v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 402 N.E.2d 76 (1980) (revoking trust based on undue influence).

In order to prevail on grounds of undue influence in Massachusetts, the party seeking to void the gift must

demonstrate that: (1) the donor was "susceptible" to undue influence to the advantage of the donee; (2) the donee deceived the donor or exerted an improper influence over the donor; and (3) the donor submitted to the "overmastering effect" of the donee's undue infuence. *Miles v. Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *Neill v. Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920). *Cf. Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 223, 500 N.E.2d 835, 840 (1986). Before these ultimate findings can be made, there must be a "solid foundation of established facts upon which to rest an inference of [the existence of undue influence]." *Neill v. Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920).

The Massachusetts courts recognize that much of this evidence will be circumstantial because direct evidence of undue influence is often unavailable. *See Miles v. Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *Eddy v. Eddy*, 281 Mass. 156, 158, 183 N.E. 268, 268 - 69 (1932); *Woodbury v. Woodbury*, 141 Mass. 329, 333, 5 N.E. 275, 280 (1886). The Supreme Judicial Court of Massachusetts has stated that undue influence works in "veiled and secret ways...[T]he power of a strong will over an irresolute character or one weakened by disease, overindulgence or age may be manifest although not shown by gross or palpable instrumentalities." *Neill v. Brackett, supra*, at 369, 126 N.E. at 94. The nature of undue influence is such that it may be "exercised in indirect and underhanded ways difficult to be come at [through direct evidence]." *Hoffman v. Hoffman*, 192 Mass. 416, 419, 78 N.E. 492, 493 (1906). In making a determination of undue influence in a particular case, the court must normally consider all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties. *See Neill v. Brackett, supra*, at 369 - 70, 126 N.E. at 94. Specific undue influence cases tend to be lonely islands of facts

in an ocean of law; what constitutes undue influence in one case will not necessarily constitute undue influence in a similar case. *See Hoffman v. Hoffman, supra*, at 419, 78 N.E. at 493.

The crux of the problem is of course the difficulty in determining in a particular case what degree of influence is "undue." The term "undue" necessarily implies that there are some types of influence which are "due," and courts have recognized that in all close relationships people exert an influence on each other which is natural and proper. *See Heinrich v. Silverman*, 23 Mass. App. Ct. 218, 226, 500 N.E.2d 835, 841 (1986) (Power of influence normally held by one friend over another will not automatically defeat bequest; such influence is "a simple and expected consequence of human friendship and ... compassion."); *Neill v. Brackett, supra*, at 370, 78 N.E. at 94 (Persuasive and effective influences -- such as a wife directing her husband's attention to "proper obligations" which he should provide for in his will -- are not undue so long as they are not coercive).

The general test for "undue" influence in Massachusetts is whether, based upon all the circumstances in a particular case, a donee has exercised "unfair persuasion" against: (1) a donor whom the beneficiary dominates; or (2) a donor who, by virtue of the relationship between the donor and donee, is justified in assuming that the donee will not act in a manner inconsistent with the donor's welfare. *Bruno v. Bruno*, 384 Mass. 31, 34, 422 N.E.2d 1369, 1371 - 72 (1981); *see Tarricone v. Cummings*, 340 Mass. 758, 762 - 63, 166 N.E.2d 737, 740 - 41 (1960); *Neill v. Brackett, supra; Eddy v. Eddy,* 281 Mass. 156, 160 - 62, 183 N.E. 268, 270 (1932); *see also Restatement (Second) of Contracts* § 171(1) (1981) (adopted in *Bruno v. Bruno*, as "substantially similar" to general law of Massachusetts on undue influence). The point at which influence becomes undue or

persuasion becomes unfair is controlled by the circumstances and the characteristics of the parties in the particular case.

> Any species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the [donor].

Neill v. Brackett, supra, at 369, 126 N.E. at 94.

The Claimant argues that the existence of a confidential relationship between donor and donee, coupled with the failure of the donee to encourage the donor to obtain independent advice, requires the fact finder to presume that the disposition was the product of undue influence. She relies primarily upon *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 402 N.E.2d 76 (1980). The Church contends that a confidential relationship raises no such presumption under current Massachusetts law. The Church relies on a more recent Massachusetts Appeals Court decision, *Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 500 N.E.2d 835 (1986), and Massachusetts Supreme Judicial Court decisions holding that a confidential relationship only gives the court cause for "closer" or "jealous" scrutiny of the transaction. *O'Brien v. Wellesley College*, 346 Mass. 192, 190 N.E.2d 879 (1963); *Eddy v. Eddy*, 281 Mass. 156, 183 N.E. 268 (1932). The Church points also to the well-established proposition that the burden of proving undue influence is normally on the party challenging the disposition. *Miles v. Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *New England Merchants National*

Bank of Boston v. Mahoney, 356 Mass. 654, 657, 255 N.E.2d 592, 594 (1970); *Tarricone v. Commings*, 340 Mass. 758, 762, 166 N.E.2d 737, 740 (1960).

This question concerning the creation of a presumption has not been resolved by the Supreme Judicial Court of Massachusetts. The Claimant is correct in that *Markell* establishes that a donee in a confidential relationship with the donor has a fiduciary duty to disclose all relevant facts to the donor known to him, and the encourage the donor to seek meaningful independent advice about the transaction. *Markell*, 9 Mass. App. Ct. at 443 - 45, 402 N.E.2d at 95 - 96. *Heinrich v. Silvernail* may be reconcilable with *Markell* because *Heinrich* involved a bequest in a will rather than the creation of irrevocable trusts in favor of the donee. Under Massachusetts law, the requirement for proof of undue influence is greater when a will is involved. *Neil v. Brackett, supra*, at 370, 126 N.E. at 94; *see Wellman v. Carter*, 286 Mass. 237, 190 N.E. 493 (1934) (Bequest in will to attorney who drafted the will is not subject to presumption of undue influence normally applied when donee is attorney of donor).

Although the Supreme Judicial Court of Massachusetts, if this case were before it, might well approve the reasoning in *Makell* and adopt a presumption of undue influence in a gift to a donee in a confidential relationship with the donor, this Court need not decide this question.[1] There is ample evidence of undue influence here, with or without artificial presumptions. The Court and the parties have tried this case without reference

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[1] A large number of states do adopt such a presumption when a parishioner gives a nontestementary gift to a clergyman or spiritual advisor, and a confidential relationship exists between the two. *See generally* 38 Am. Jur. 2d, *Gifts*, §§93, 94 (1968 & Supp. 1986); Annotation, *Undue Influence in Nontestementary Gift to Clergyman, Spiritual Advisor, or Church*, 14 A.L.R.2d 649.

to presumptions, and we decide it without relying on any presumption.

B. CLAIMANT'S SUSCEPTIBILITY TO INFLUENCE

After a week or so of trial, the Court met with counsel for the purpose of exploring ways in which the length of the trial might be limited. Dr. Gersh, a psychiatrist who had examined the Claimant in Iowa, had by that time testified for the Claimant. Counsel for the Claimant had planned to introduce additional medical testimony on the issue of the Claimant's susceptibility to influence; this testimony apparently would have included some proffered expert opinion on methods used by "cults." Counsel for the Church planned to introduce evidence attacking the techniques used by the Claimant's anticipated experts, whose names had been furnished to counsel pursuant to a pretrial order. The Court suggested the possibility of each side foregoing such evidence. The parties arrived at a stipulation, which was read into the record, whereby they agreed to refrain from all such evidence and they stipulated that the Claimant was a person who could be influenced, within the meaning of such decisions as *Neill v. Brackett, supra,* and *Miles v. Caples, supra.*

The Court also finds, based upon the testimony of Dr. Gersh and other evidence, that the Claimant is more susceptible to influence that the average person. The Claimant practiced transcendental meditation for a number of years prior to joining the Church. This frequently caused her to hallucinate. She depended upon her daily meditation periods, and when she did not have them she tended to be irritable. She underwent psychotherapy for about three years in Minneapolis during and after college. This involved basic Freudian psychotherapy administered three to five times per week. She "totally"

depended upon her psychotherapist during this period. She left him only after becoming involved in transcendental meditation, at his suggestion - based upon his own experience in its techniques.

In summary, the Claimant is a suggestible, dependent and trusting person. These qualities coexist with her high intelligence and enthusiasm in her many and varied interests.

C. CLAIMANT'S CONFIDENTIAL RELATIONSHIP WITH STEVENS

By the Fall of 1983, the Claimant was totally immersed in the Church. Commencing then, and continuing through to the end of 1985, she saw Stevens constantly. She attended his daily Bible classes and "rap" sessions each morning. She would often drive between classes with him, and she frequently joined him for lunch. She listened to tapes of his sermons, and had frequent private counseling sessions with him. These were often unscheduled sessions which do not appear on his diary; she had the right to see him without an appointment.

The Claimant sought and accepted advice from Stevens on every aspect of her life: spiritual, marital, family, social, personal, and financial. She disclosed all manners of confidence to him concerning such matters, including the details of her wealth. Stevens advised her on the raising of her children. He told her how to view everyone she came into contact with, with whom to make friends and whom to avoid.

The Claimant trusted, loved and revered Stevens as a pastor and as a mentor. Although their relationship remained platonic throughout, she was totally devoted to him. The thought that he would want anything that was not in her best interests never entered her mind. She believed that he loved

and respected her in return. Stevens was well aware of the Claimant's total devotion to him and dependence upon him. The Claimant and Stevens therefore had a confidential relationship.

D. STEVENS'S ALIENATION AND DECEIT OF JONAS AND OTHERS

We have already set forth how Stevens caused the Claimant to begin viewing Jonas as one consigned to the Kingdom of Darkness because he had not professed to have been born again through the Church. Stevens soon had the Claimant convinced that Jonas was controlled by the Devil, and he constantly reminded her of this by piously asking her to pray for Jonas. This was done for the purpose of reducing the ability that Jonas had to influence the Claimant, so as to thereby increase Steven's dominion over her. It was a highly successful tactic. For two and one-half years the Claimant viewed Jonas with an odd mixture of love, hate, dread and pity. She regarded his objections to the $1 million gift as having been inspired by Satan to prevent God's work. She didn't give him a chance to object to the later gifts by not informing him of them, at Stevens's direction.

Stevens did not stop there. He convinced the Claimant that Jonas should get a full-time job. Not only that, he had her believing that Jonas should be earning enough money to support them in the style in which they were then living, a seemingly impossible goal for even the most successful free lance photographer. He said to her at one point: "Betsy, if I were your husband, I would earn so much money for you -- you would be so proud of me."

This all had its intended effect. The Claimant told Jonas that he should get a job and support them. It had been their practice to maintain separate checkbooks, with Jonas

paying house expenses from deposits made from the Claimant's investment income. As time went on, the Claimant objected more and more to the continuance of this practice. For the first time in their marriage, they began to bicker constantly over money. Jonas withdrew into his work, and took an increasing number of trips away from Lenox.

This is not to say that Jonas accepted any of this. It was obvious to him who was behind it, and he voiced strong objections to Stevens about what Stevens was doing. On April 16, 1985, he wrote to Stevens of the Claimant raising "questions about the way I live and my function as a husband," stating he believed that Stevens was the "catalyst" or "instrumental" in this change in her attitude toward him. He pointed out the absurdity of the Claimant telling him to get a full-time job in order to support the family while at the same time giving the Church $1 million. He asked for help from Stevens.

Stevens sent a letter in reply, full of pious platitudes and quotes from the Bible, protesting the charge that he had interfered in the marriage, and saying that he always told the Claimant to honor Jonas and had told her to give him $1 million. On May 20, 1985, Stevens added to this campaign of deceit by giving the Claimant a letter he wrote to her with the direction that she leave it in a spot where Jonas would be sure to find it, which she did. In that letter, Stevens purported to encourage the Claimant to obey and honor Jonas, and to permit Jonas to take part in all major financial decisions. This was at a time when he had just been successful in extracting $5 million from the Claimant and preventing Jonas from knowing about it.

Jonas wrote to Stevens again on October 7, 1985, saying he could no longer live with the Claimant under the terms she was dictating to him. He stated his belief that the Church was the heart of the problem, in what he considered a

"perversion of faith." He again pointed out the absurdity of the Claimant requiring him to support the family, in light of the inequality of their respective incomes. He closed by saying "I pray, sir, you give her no more financial advice, even if she asks for it." Stevens replied with more platitudes. Continuing his campaign to buy Jonas off, he related how he had told the Claimant to give Jonas $1 million.

On December 3, 1985, Jonas returned from a long trip to Pakistan and Afghanistan. He wrote to Stevens on December 7th, protesting the fact that the Claimant had recently given $10,000 to the Church without his knowledge. Soon thereafter he learned from Wallace Dayton of the $5 Million gift. He confronted Stevens, without telling him of this knowledge, and, as we have related, Stevens swore on a Bible that the Claimant had made no large gift to the Church after the $1 million gift the year before.

In November of 1985, after the Eagle articles came out, Stevens decided to implement his plan to buy Jonas off, and to increase the ante to $1.6 million, plus some Pennsylvania real estate, a promise of more money later, and a commitment by the Claimant to make subsequent gifts to the Church only from income rather than principal. In return, he wanted Jonas to promise not to try to influence the Claimant in her relationship with the Church.

Stevens told the Claimant to have Campoli dread up an agreement to this effect. He privately gave Hill her instructions, which included a clause whereby Jonas was to waive the right to any other property in the event of a later divorce. Hill and the Claimant then had several meetings with Campoli on the subject. Hill presented Campoli with an initial version of the agreement, which was entirely in her writing, and she worked with him on subsequent drafts. Campoli drew up

the agreement almost word for word from Hill's initial draft, and on December 16, 1985 the Claimant signed it. By that time, one of the Claimant's promises in the agreement had already been broken. The agreement contained a clause wherein she promised Jonas an "incredible amount" under her will; this was in stark contradiction to the fact that three days before she had signed a will leaving his as little as the law would allow. The Claimant then presented the proposed agreement to Jonas. Not surprisingly, he refused to sign it.

Stevens's activities in alienating the Claimant from others who could influence her, and his deceit of them, have already been described. It will be recalled Stevens had filled the Claimant's head with long harranges to the effect that all those upon whom she had previously depended, including her family, her present lawyer, Okabena and anyone who sought to frustrate her gifts to the Church, were possessed by demons and were doing the work of the Devil. His command that she lie to her father about her intentions on the $5 million was justified in these diatribes as legitimate frustration of the work of the Devil.

E. MANNER AND CIRCUMSTANCES OF GIFTS

The manner and circumstances of a gift can be significant in an inquiry concerning undue influence. *Neill v. Brackett, supra*, at 369, 126 N.E. at 94. The ways in which the gifts were given here were unusual and somewhat suspicious. The claimant gave the first million dollar gift outright, despite sound advice from financial advisors suggesting methods of avoiding the tax consequences of making a gift of that size at the end of the year. The second gift of five million dollars was made with no such independent advice whatsoever. For the Claimant to make a gift of that size in one lump sum without

any consideration of tax consequences or financial planning is astounding. The fact that she did so after consulting only with Stevens and nobody else, not even Jonas, is even more astounding. Finally, the "anonymous" gift of $500,000 to the Church is also somewhat unusual. She initially intended to make the gift in her own name, as she had with the other gifts. She changed the gift to an anonymous gift through Dean Witter at the request of Stevens, who wished to avoid any appearance of knowing about the gift or of its source because of recent adverse publicity. He still wanted the money, however, and was willing to accept any "anonymous" cash gifts the Claimant wished to make. In addition, despite the size of the gift, the Claimant again sought no advice as to the most advantageous way to make the gift; the manner and form of this gift were entirely to the advantage of the Church.

F. INFLUENCE AND DOMINION BY STEVENS IN HIS CONDUCT WITH CLAIMANT

Stevens's influence over the Claimant was achieved in part by deceit and insincerity in his dealings with her. He was insincere with her when he constantly told her that she had the power to release God's judgment by bringing about miracles through her gifts to the Church, that her primary purpose in life was to give her wealth to the Church, and that Jonas and others were controlled by demons. He had no good faith belief in these statements, as we will discuss later in this opinion.

Much time was devoted at trial to the question of whether Stevens and Baum knew of Turkia's release when they spoke by telephone to the Claimant on April 18th and April 21st. The Court ruled during the trial that the Church's counsel had made a binding judicial admission, in connection with pretrial discovery, that Turkia's wife was notified by telephone

of his release on the evening of April 17th. Mrs. Turkia testified that she must have misunderstood the telephone message of April 17th. But she conceded that around 6:30 P.M. Lenox time on April 18th, she had a twelve minute conversation with a minister of the Church in Vienna with whom Turkia spent that evening. Although she could not remember the details of that long conversation, she denied that she learned of his release during that conversation either.

Mrs. Turkia seems to have been confused and under a strain during that period. The Court finds, as a supplement to the judicial admission, that Mrs. Turkia knew of her husband's release no later than April 18th at 6:30 P.M. Lenox time. The Court further finds that Stevens and Baum were aware of Turkia's release when they discussed the impending $5 million gift with the Claimant over the telephone on the evening of April 21st.

Perhaps more has been made of this point than it deserves. The issue of the knowledge that Stevens and Baum had of Turkia's release is relatively insignificant when compared with their insincerity in telling the Claimant that her money had the power to bring about the release. It is this insincerity and its effect that is most relevant. It is as pernicious as their earlier insincerity in telling the Claimant that her money could cure Baum's migraine condition, and their deception of her that it did.

Implicit in all of the Claimant's dealings with Stevens, and indeed glaringly obvious, is his total dominion and control over her. This was accomplished through his express directions as well as through the various means already described. Stevens demanded the Claimant's total submission to him. He told her to concentrate on his every word. At his suggestion, she took

notes while in his presence, at private as well as public sessions. She would later study these notes.

Stevens advised the Claimant to use make-up, and to be more feminine in her dress and hairstyle. Although the Claimant was already quite attractive, she complied with these suggestions, thereby significantly changing her appearance. Stevens encouraged the Claimant to regard Baum, a former model, as a paradigm in this regard.

In short, the Claimant was a marionette at the end of a number of strings manipulated by Stevens. He often used Baum and Hill as his assistant puppeteers. The result was his complete ascendancy over the Claimant. The Claimant submitted to the overmastering effect of this influence.

G. CONCLUSION OF UNDUE INFLUENCE

The Church exercised undue influence upon the Claimant, not only because of the extent of Stevens's dominion over the Claimant, but only because of the various unfair and improper means which he used in gaining ascendency over her. We here highlight only a few. An important part of his strategy was to eliminate the ability of all others to influence her. The most despicable, and perhaps the most effective, aspect of this was the elimination of Jonas' ability to influence the Claimant. In doing this, Stevens showed no regard for the sanctity of marriage. His deceit and insincerity concerning Jonas all but destroyed the Claimant's marriage. His deceit and insincerity with respect to the other members of the Claimant's family drastically changed her attitude toward them, and also eliminated them as an alternate source of advice.

Stevens's relationship of trust and confidence with the Claimant creates no presumption of undue influence. The relationship did, however, facilitate his ability to unduly influence the claimant. Moreover, Stevens abused that relationship, in the ways already described. Among the most startling acts was the way that he dealt with the Claimant concerning her independent financial and legal advisors. Not once did he even suggest that she consult them. To the contrary, he advised her against doing this. Eventually, he succeeded in replacing them with advisors who owed their primary loyalty to him rather than the Claimant.

Stevens also unfairly, and unduly, influenced the Claimant through his insincerity in his statements to her. Particularly appalling is his insincerity in telling her that her mission from God on earth was to give money to the Church, that her money gave her the power to work miracles, and that Jonas and others were possessed by the Devil. He believed none of this, and yet he intended that the Claimant believe it and he knew that she did.

In light of the foregoing, and in light of the findings of fact contained throughout this opinion, we rule that all of the claimant's gifts were the product of undue influence exercised upon her by the Church through Stevens. *Bruno v. Bruno*, 384 Mass. 1, 422 N.E.2d 1369 (1981); *Miles v. Caples*, 362 Mass. 107, 284 N.E.2d 231 (1972); *Neill v. Brackett*, 234 Mass. 367, 126 N.E.2d 93 (1920).

III. FIRST AMENDMENT

The Church seeks the sanctuary of the First Amendment's command against laws prohibiting the free exercise of religion. We have previously overruled the Church's First Amendment objections to certain discovery sought by the Claimant, but at that time we reserved for later decision the possible effect that the First Amendment might have upon the merits of this claim. *See In re The Bible Speaks*, 69 B.R. 643 (Bankr. D. Mass. 1987). The Church now contends that the Claimant's cause of action is barred because it cannot be resolved without the Court inquiring into "prohibited areas involving religious concepts, such as belief in miracles and demons." It apparently takes the position that this claim presents a case concerning intrachurch differences in doctrine or practices, an area in which civil courts cannot tread. The Church would also have us view the Claimant's case as a complaint that she has been duped by allegedly false religious beliefs, so that its resolution requires a determination of the validity of those beliefs. In this rather generalized fashion, it seeks to throw a cloak of First Amendment immunity around what had transpired here.

The Church's First Amendment arguments do not withstand any close analysis. Nor are they supported by even one of the cases which it cites. We conclude that the First Amendment does not protect the Church from this claim, for three reasons: the distinction between Stevens's statements and the Church's beliefs and practices, Stevens's insincerity, and the compelling policy grounds that support the claim. Each of these considerations, in our opinion, is sufficient to deny the Church

its asserted constitutional privilege. Taken together, they are overwhelming. We shall discuss each separately.

A. DISTINCTION BETWEEN STEVENS'S STATEMENTS AND CHURCH BELIEFS AND PRACTICES

There is, of course, no question that the Church is a religion whose views are entitled to First Amendment protection. It is a Christian church which places emphasis upon the Bible. We need not, and constitutionally we cannot, go beyond this obvious observation. There is therefore no occasion here to make the type of delicate threshold inquiry that a court must make when a party claims constitutional privilege by reason of adherence to a religion which is not among the commonly recognized religions, an inquiry which no longer can concentrate on theism. *See Malnak v. Yogi*, 592 F. 2d 197 (3d Cir. 1979); *Theriault v. Carlson*, 495 F. 2d 390 (5th Cir. 1974), *cert. den.* 419 U. S. 1003 (1974); *The Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969), *cert. den.* 396 U.S. 963 (1969); *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968); *Holy Spirit Association for the Unification of World Christianity v. Tax Commission of City of New York*, 55 N.Y. 2d 512, 450 N.Y.S. 2d 292, 435 N.E. 2d 662 (1982). *See also Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978).

We recognize also that there can be no bright line in free exercise cases between religious belief and action, and that action in some circumstances in equally entitled to protection.

Murdock v. Pennsylvania, 319 U. S. 105 (1943); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *People v. Woody*, 61 Cal. 2d 716, 394 P. 2d 813, 40 Cal. Rptr. 69 (1964). That distinction, in any event, is especially blurred here where the conduct for which privilege is sought, when viewed in isolation, consists of statements, rather than action in the usual sense.

The First Amendment protects only the religious beliefs and practices of the party claiming the privilege. *Wisconsin v. Yoder*, 406 U. S. 205, 230-231 (1972). *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1141 (D. Mass. 1982). The Church's First Amendment argument flounders on this basic principle. The Claimant does not contend that she has been defrauded by false or pernicious religious beliefs or practices of the Church, or that she was unfairly manipulated into adopting the Church's beliefs or practices. The Claimant's complaint has nothing to do with the validity or reasonableness of the Church's religious beliefs or practices. She charges only that undue influence was exerted upon her which consisted, in part, of certain statements of Stevens previously referred to having reference to God and the Devil. Stevens, among his many other ploys and manipulations, told the Claimant that she could effect God's miracles through her gifts to the Church; that her primary mission on earth, by the command of God, was to give money to the Church; and that Jonas, her family and her advisors, and all of those who have not been born again through the Church, were possessed by demons so that they are the instruments of the Devil.

It is abundantly clear from the evidence offered by the Church itself that these statements do not represent Church doctrines or practices. Nor does the Church even contend otherwise. To the contrary, we have the testimony of Stevens

and Pastor John Leonard, President of The Stevens School of the Bible, both of whom were examined specifically concerning the statements. Both denied that Stevens's statements represent Church doctrines, beliefs or practices. They categorically denied that the Church believed or practiced the doctrines that wealthy people such as the Claimant have as their primary mission on earth the giving of money to the Church, or that they can bring about God's miracles through gifts to the Church. They also denied the existence of any Church doctrine that those who have not been born again through the Church are controlled by demons and are instruments of the Devil. In fact, Stevens denied making the statements at all. The statements do not, moreover, represent Stevens's personal religious beliefs.

This case is, therefore, quite different from one in which the complaint is based upon statements such as "God will reward you for giving to His Church." That statement would be perfectly consistent with Church beliefs and practices, and may, on its face, be entitled to constitutional protection. Such a statement would also, of course, lack the compelling nature of what was actually said to the Claimant.

We are not dealing here with something akin to a complaint against the Hare Krishnas for fraud in their religious practice known as Sankirtan, which consists of proselytizing through a public solicitation that includes the sale of trinkets. Sankirtan is an essential practice in the Hare Krishna religion, so that restrictions upon it raise substantial First Amendment questions. *See International Society for Krishna Consciousness, Inc. v. Barber*, 650 F. 2d 430, 441 (2d Cir. 1981). Here, not only were Stevens's statements opposed to Church beliefs and practices, Stevens even asserted that they were contrary to a

Church policy of soliciting funds on an individual basis rather than through general exhortation from the pulpit.

Our conclusion that a minister of a church, in speaking of God and the Devil, was not imparting the beliefs and practices of his church would in some circumstances be a determination that is frought with peril. A court should not normally, over the protests of a party, label as unreligious the statements or actions of that party. This is the clear message of *Thomas v. Review Board of Indiana*, 450 U. S. 707 (1981), which involved a Jehovah's Witness who quit his job because of his convictions against war when he was transferred to a plant which manufactured tanks. He said that he did this for religious reasons, but he admitted that a fellow worker, also Jehovah's Witness, did not have the same compunctions. When he later applied for unemployment benefits, the Supreme Court of Indiana took an objective view and concluded that he acted out of personal philosophical motives rather than for religious reasons. The Supreme Court reversed, ruling that it was not for a court to indulge in such refined analysis over the protest of one having honest religious convictions. Our case, however, is much different. Here, not only does the Church make no attempt to identify Stevens's statements as part of Church beliefs or practices, it takes the unequivocal position that they are not its beliefs or practices. We therefore engage in no conclusions contrary to stated subjective religious beliefs of a party as did the Supreme Court of Indiana in *Thomas*.

The Church places heavy reliance on *Molko v. Holy Spirit Association for the Unification of World Christianity*, 179 Cal. App. 3d 450, 224 Cal. Rptr. 817 (1986), which is presently on appeal to the Supreme Court of California. In that case, former church members brought suit against the Unification

Church, which was founded by Reverend Sun Myung Moon in Korea. The plaintiffs sought damages for fraud, intentional infliction of emotional distress, and false imprisonment. One plaintiff also claimed restitution for $6,000 contributed to the church while he was a member. The court dismissed the count for fraud because, although the plaintiffs had initially been deceived as to the nature and identity of the church when they were first recruited, they soon learned the true facts and chose to stay on thereafter. The counts for false imprisonment and intentional infliction of emotional distress were also dismissed because there had been only "coercive persuasion" in the religious realm, such as threats of divine retribution, rather than physical restraint or threats of physical harm.

The count for restitution in *Molko*, the claim most similar to that of the Claimant here, was grounded on fraudulent inducements to join the church, as well as domination of the plaintiff through physical and psychological manipulation. The plaintiff had given $6,000 upon being told that the church was in desperate need of funds, and that "the Heavenly Father would really appreciate, and really look favorably on seeing me give the money to the church." The court found that he freely gave the money out of religious beliefs of the Unification Church which he no longer held at the time of the suit. It concluded that adjudication of his claim would necessarily involved inquiry into the reasonableness of those beliefs, an inquiry which the First Amendment forecloses. It relied upon *United States v. Ballard*, 322 U. S. 78 (1944), the seminal Supreme Court decision holding that the First Amendment prohibits adjudication of the truth or falsity of religious beliefs. In *Ballard*, the Supreme Court dismissed a prosecution for mail fraud against members of the "I am" movement for having made allegedly false representations

concerning various religious tenets, such as the belief that the leader's movement had the power to heal incurable diseases.

Molko is quite distinguishable from our case. The undue influence charged there consisted primarily of allegedly unfair psychological manipulation into adoption of religious beliefs. The court regarded these beliefs as having motivated the gift. It correctly ruled that any determination of improper conduct by the church would necessarily require an assessment of the reasonableness of its religious beliefs, and that this assessment is constitutionally foreclosed. That is not our situation. We have no occasion to assess the reasonableness of the Church's doctrine and practices. We are concerned only with Stevens's statements. The Claimant does not even charge that Stevens's statements were false, so that, even with respect to his statements, this case cannot be viewed as a civil action equivalent of *Ballard*.

Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977), was relied upon by the court in *Molko* and is similar to it. The parents of adult children who had joined the Unification Church sought to have themselves appointed guardians of the children over their objection. The parents alleged that the children, to their detriment, had changed their life style as the result of the church's coercive persuasion concerning its religion. The court recognized that it was being asked to determine the validity of the beliefs of the children. It found no compelling policy reason to do so. Citing *Ballard*, it correctly dismissed the suit.

Nor is the Church aided by any of the other cases which it cites. *Meroni v. The Holy Spirit Association for the Unification of World Christianity*, 506 N.Y.S. 2d 174 (N.Y. App.

Div. 1986), is not on point. That was a suit by a father charging that the Unification Church had intentionally inflicted emotional distress upon his son, which caused the son to commit suicide. The court merely held that, under traditional tort law, the church's alleged "brainwashing" was not sufficiently extreme or outrageous conduct to be actionable. *Baumgartner v. First Church of Christ, Scientist*, 141 Ill. App. 3d 898,490 N.E.2d 1319 (1986), *cert. den.* 107 S. Ct. 317 (1986), was an action for the wrongful death of a former church member which was allegedly caused by the church's deviation from standard Christian Scientist care and its negligence is failing to withdraw the decedent from the Christian Scientist treatment he was receiving. The court dismissed the case, holding that the First Amendment prohibits the requested inquiry into the validity and propriety of Christian Science beliefs, citing decisions such as *Thomas*. Obviously, that case involved an asserted conflict between church beliefs and individual rights. No such conflict exists here.

The Church seeks to buttress its argument of constitutional privilege by citing decisions in *The Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevick*, 426 U. S. 696 (1976); *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 363 U. S. 190 (1960). These decisions are wide of the mark. They deal with either doctrinal or administrative disputes within a church. In them, the Supreme Court established the wise principle that the government should not become embroiled in internecine church matters. It rejected the English common law doctrine that property contributed to a church is impressed with an implied trust in favor of the doctrines and practices of the church in effect at the time of the contribution. To the same

effect is *Madsen v. Erwin*, 395 Mass. 715, 481 N.E. 2d 1160 (1985), which involved the firing of an employee by the Christian Scientist Church because of the church's religious convictions against homosexuality. The court dismissed the suit as one involving hierarchical polity on matters of internal organization and faith.

Those considerations are far removed from what is before the Court here. We are not concerned with internal church division or schism *(Presbyterian Church, Kedroff)* or the propriety of the defrocking of a bishop *(Serbian Orthodox Diocese)*. The present case is more like *General Council on Finance & Administration, United Methodist Council v. California Superior Court*, 439 U. S. 1369 (Rehnquist, Circuit Justice 1978), which involved an action against a church for breach of contract, fraud and violations of security laws. In denying the church's application for a stay, Justice Rehnquist distinguished the *Kedroff* line of cases as involving matters of ecclesiastical cognizance and polity over which civil courts should not become entangled. As in *United Methodist Council*, there is no dispute here concerning the interpretation or propriety of the Church's doctrines or practices.

The Church seeks support in the following passage from L. Tribe, *American Constitutional Law* 874 - 75 (1978):

> Once it is conceded that first amendment values are unacceptably compromised when civil courts undertake to settle religious issues, it becomes clear that allowing a legal determination about property or some other secular matter to turn on a court's answer to a religious question represents a path fraught with peril: the path is one along which

> unsatisfied former believers could drag the civil courts into the theological thicket by the simple expedient of suing for a refund of their prior donations to a religious organization.

This passage is a part of Professor Tribe's discussion of *Presbyterian Church, Kedroff* and *Serbian Orthodox Diocese*. He is speaking of a suit by an apostate or dissident who seeks a refund because of his disagreement with a church's doctrines or religious practice, such as in the *Molko* case.

In summary, our decision does not turn upon the truth or reasonableness, or even the sincerity, of the Church's doctrines or practices. The Claimant does not dispute them, nor is there any question as to what they are. The Claimant is not a Church dissident or apostate contesting Church doctrine. She does not attack Church practices in obtaining or keeping her as a parishioner. Her complaint is that Stevens's entire course of conduct constituted undue influence upon her on behalf of the Church. Included within that conduct are certain statements pertaining to God and the Devil which have been disavowed by the Church as part of its doctrine. Obviously her gifts were religiously motivated, as is true of all undue influence cases against church or clergy, but it is the exploitation of her religious motivations through unfair means that constitutes an element of her cause of action.

B. Insincerity of Stevens in Making Statements

We are equally persuaded, even assuming that Stevens's statements would otherwise be entitled to First Amendment protection, that the Church's claim of privilege

must fail because of Stevens's insincerity. Sincerity has traditionally played an important role in the protection of rights under the free exercise of religion clause. Good faith is often a vital consideration when a court is called upon to conduct an initial threshold inquiry to determine whether the views of an organization are entitled to protection. *See Malnak v. Yogi*, 592 F. 2d 197 (3rd Cir. 1979); *Theriault v. Carlson*, 495 F. 2d 390 (5th Cir. 1974), *cert. den.* 419 U.S. 1003 (1974); *The Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968). Good faith and sincerity are also relevant even though the religious nature of the organization claiming the privilege in not in question. In *Wisconsin v. Yoder*, 406 U. S. 205 (1971), the court was faced with the claim of members of the Amish Mennonite Church to an exemption from a state law requiring their children to attend public or private school. Formal high school education was claimed to be contrary to Amish beliefs because it placed their children in an environment that emphasized materialistic competition. In granting the Amish their requested exemption, the court emphasized their deep religious "conviction" concerning the matter. 406 U. S. at 216. *Thomas v. Review Board of Indiana*, 450 U. S. 707 (1981), is to the same effect. The court there required payment of unemployment benefits to a Jehovah's Witness because he had terminated his employment by reason of his "honest conviction" that working at a weapons plant was against his religion. 450 U. S. at 716. *United States v. Seeger*, 380 U. S. 163 (1965), granted an exemption from the draft to a conscientious objector because of his sincere and meaningful beliefs opposed to war. Although this decision on its face was concerned only with interpretation of the selective service statute, it is clear from its reasoning that the court regarded its interpretation of the statute as constitutionally required.

Scrutiny of the sincerity of a religious belief "involves a somewhat truncated inquiry which must focus on extrinsic evidence." *Van Schaick, supra*, at 1145. *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F. 2d 430, 441 (2d Cir. 1981). The extrinsic evidence here is overwhelming in showing Stevens's insincerity. His entire course of conduct is replete with hypocrisy concerning matters that do not involve religious topics. His insincerity is also indicated by his denial that he made the statements at all and his concession that they do not represent Church doctrine. The statements concerning God and the Devil were but a part of a course of manipulative conduct.

We recognize that the withdrawal of First Amendment privileges because of insincerity has its dangers. It is conceivable to imagine situations where a finding of insincerity by a court can be a disguised way of holding that religious beliefs are false or invalid. *See United States v. Ballard*, 322 U. S. 78, 92 - 95 (1944) (Jackson, J., dissenting). But those dangers are not present here for two reasons. First, there is ample evidence of Stevens's insincerity, evidence which is quite independent of the statements themselves. Second, it is undisputed that his statements do not represent Church beliefs or practices.

The decision in *Estate of Supple*, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966), *cert. den.* 389 U. S. 820 (1967), is instructive on the relevance of Stevens's insincerity. *Supple* involved a claim for undue influence of a testator brought against the Roman Catholic Church, which was the principal beneficiary under the will. It was alleged that the church had imparted various religious tenets to the testator, and that these tenets were "false." The court dismissed the claim on the

authority of the *Ballard* decision, but only after declaring that insincere religious beliefs are not protected and pointing out that there had been no allegation of insincerity. The church in its answer had denied some of the alleged tents, and the court recognized that such denials could provide grounds for finding insincerity. The court dismissed the complaint notwithstanding this because the plaintiff had previously been given ample opportunity to amend. Here the question of insincerity is fully open and the answer is obvious.

C. COMPELLING REASONS SUPPORTING CLAIM

There are compelling policy reasons supporting this claim which provide an independent basis for denial of a First Amendment privilege. The law is a process of constant adjustment between conflicting rights for the common good. No asserted right can at all times and in all circumstances be superior to all others. And so it is with the First Amendment, despite its exalted place in our law. For example, freedom of speech and the press are placed in the same high category as the right to the free exercise of religion, and yet rights under the law of libel and slander are preeminent.

Most of the cases concerning the free exercise clause involve attempted regulations by the state. It is well established that the state can enact reasonable regulations governing the time, place and manner of the exercise of religion. *Cantwell v. Connecticut*, 310 U. S. 296 (1940). The state may, for example, require a permit for the conduct of a religious procession on public streets, *Cox v. New Hampshire*, 312 U. S. 569 (1941), or for the holding of religious services in a municipal park. *Poulos v. New Hampshire*, 345 U. S. 395 (1953). The state may also

make members of the Hare Krishna religion practice their rite of Sankirtan only at an assigned booth in a state fair, rather than throughout the public fairgrounds, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), and make Orthodox Jews close their business on Sundays, *Bromfield v. Brown*, 366 U. S. 599 (1961). A valid time, place and manner restriction must, however, serve a significant government interest. *Heffron*, 452 U. S. at 649.

In *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A. 2d 105 (1975), the principle of permitting subordination of free exercise rights to significant government interests was applied to a private cause of action. The plaintiff had been excommunicated from the Reformed Mennonite Church because of his criticism of the church's teachings and practices. In addition to excommunication, the church also ordered its members to "shun" him. Shunning was a practice of the church which involved a total boycott, whereby members were prohibited from having business or social contact with the pariah. The plaintiff alleged that this had caused his business and marriage to collapse. He claimed that not only had he lost customers and suppliers, but also his wife and children refused to have contact with him. The court overruled a dumurrer to the complaint for equitable relief. It cited the Supreme Court decisions allowing state regulation to which we have referred, and held that the plaintiff had alleged excessive interference in areas of paramount state concern pertaining to the maintenance of sound marital and family relations free from the alienation efforts of others, as well as the maintenance of a business free from tortious interference.

In *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 361 N.E. 2d 543 (1976), several husbands brought an action for

alienation of affection of their wives against a church of the Roman Catholic faith and a bishop of the church. The church and the bishop were opposed to recent changes in the international church, and taught Roman Catholicism as it had existed before the changes. The wives left the husbands and took their children from Toledo to Idaho so that they could get the desired religious education with the bishop. A jury awarded compensatory and punitive damages to the husbands. The appeals court reversed, but on the ground that there was no evidence the church intended to destroy the marriages. The court noted that a strong and compelling state interest, such as the preservation of marriage, could justify a cause of action based upon such intentional conduct despite free exercise rights. *Radecki*, 50 Ohio App. 2d at 94, 361 N.E. 2d at 545 - 46.

The interests which the Claimant seeks to protect are equally compelling. A cause of action for undue influence is grounded upon important policy considerations favoring the distribution of property in accordance with free exercise of the human will untramelled by psychological or physical coercion. Moreover, in this case, as in *Bear*, we are confronted with intentional conduct that threatened a marriage and a family, the basic social unit. Stevens's attempts to ruin the Claimant's marriage were intentional and malicious. These considerations, to our mind, far outweigh any restriction today's ruling places upon the Church's right of free exercise, even if Steven's statements would otherwise be entitled to protection on their face. We also have in mind that his statements are but a part of other conduct that reeks of undue influence and raises no First Amendment issues.

IV. CONCLUSION

The Church cannot, under the cloak of religion, commit wrongs upon the public. *Cantwell v. Connecticut*, 310 U. S. 296, 306. The Claimant is entitled to recover all her contributions because of the Church's undue influence. We except from this ruling, however, the $10,000 cash gift which she made to Stevens personally. There has been no proof that the church received this gift. The claim is therefore ALLOWED in the sum of $6,581,356.25. A separate judgment shall issue.

At Worcester, this 19 day of May, 1987.

s/_____
James F. Queenan, Jr.
U. S. Bankruptcy Judge

Supreme Court, U.S.
FILED
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CLERK

No. 88-1977

In the Supreme Court of the United States

OCTOBER TERM, 1988

IN RE:

THE BIBLE SPEAKS,
DEBTOR,

THE BIBLE SPEAKS, INC.,
PETITIONER,

v.

ELIZABETH DOVYDENAS,
RESPONDENT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the First Circuit, the United States District Court and the United States Bankruptcy Court were correct in concluding that the Free Exercise Clause of the First Amendment is not involved in a claim of undue influence brought by a former parishioner against a church where liability is based solely on statements and conduct which the church admitted were not part of its religious beliefs or tenets?

2. Whether the United States Court of Appeals for the First Circuit, the United States District Court and the United States Bankruptcy Court were correct in concluding that the Free Exercise Clause does not require any special or heightened burden of proof, proof of causation, or standard of review in a claim for undue influence brought by a former parishioner against a church where liability is based solely on statements and conduct which the church admitted were not part of its religious beliefs or tenets?

II

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

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Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 7

Other Authorities Cited:

L. Tribe, *American Constitutional Law* (2d ed. 1988) . 7, 9, 11
Annotation, *Undue Influence In Nontestamentary Gifts to Clergyman, Spiritual Advisor or Church*, 14 A.L.R.2d 649 (1949) 14
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1977

IN RE:

THE BIBLE SPEAKS,
DEBTOR,

THE BIBLE SPEAKS, INC.,
PETITIONER,

v.

ELIZABETH DOVYDENAS,
RESPONDENT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent, Elizabeth Dovydenas, hereby opposes the petition of The Bible Speaks, Inc. ("TBS") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The respondent adopts the petitioner's text setting forth the opinions below.

Jurisdiction

The respondent adopts the petitioner's jurisdictional statement.

Respondent's Statement of the Case

Two misleading omissions from the petition for a writ of certiorari demonstrate why this unique case raises no federal constitutional issues and carries little precedential value.

A. *Petitioner Admitted At Trial That The Statements Attributed To It Did Not Reflect Its Religious Beliefs.*

First, the petition fails to disclose TBS' admission at trial that the statements and conduct on which respondent relied to establish undue influence were not part of TBS' religious beliefs. The Opinion and Order of the bankruptcy court devoted substantial discussion to TBS' admissions, which render this case *sui generis* and which deprive it of any significant issue of federal constitutional law. (Appendix ("App.") C, pp. 120a-123a). Sitting as the trier of fact, the bankruptcy court made the following findings with respect to the challenged statements that TBS' founder and leader, Carl Stevens, had made to the respondent:

> It is abundantly clear from the evidence offered by the Church itself that these statements do not represent Church doctrines or practices. Nor does the Church even contend otherwise. To the contrary, we have the testimony of Stevens and Pastor John Leonard, President of the Stevens School of the Bible, both of whom were examined specifically concerning these statements. Both denied that Stevens' statements represent Church doctrines, beliefs or practices.

(App. C, pp. 121a-122a).

Similarly, the district court, "having reviewed the entire record" (App. B, p. 48a), held that, "[a]ccording to Stevens' own testimony, these statements were not reflective of Stevens' religious beliefs," and that "[a]ppellant's attempts to invoke

the protection of the first amendment are, hence, based on a series of false premises." (App. B, pp. 71a-72a). The court continued:

> [I]t is important to point out that the statements Stevens made, which the bankruptcy court relied on in finding undue influence, are not religious beliefs or tenets of either Stevens or TBS, according to appellant's own admissions based on the testimony before the bankruptcy court. Trial Transcripts ("T. Tr.") 6B and 12.
>
> By identifying statements made by Stevens, which do not express religious beliefs or tenets of TBS, this Court is not engaging in its own review of TBS's theology. Rather, it is relying on the statements of Stevens and of John Leonard, the director of the Stevens Bible College, regarding their own theology.

(App. B, pp. 72a-73a).

It was these findings of both lower courts, grounded in petitioner's evidentiary admissions, which formed the basis for the court of appeals' holding that this case does not rise to a constitutional level.

B. *All Three Courts Below Found "But For" Causation.*

Contrary to petitioner's argument, based on one paragraph of the court of appeals' opinion taken out of context, all three courts below found that TBS' exertion of undue influence, quite apart from any sincerely-held religious belief of TBS, caused Mrs. Dovydenas to give her money to it. The bankruptcy court found that Mrs. Dovydenas had "submitted to the overmastering effect" of petitioner's conduct, and ruled "that all of [her] gifts were the product of undue influence . . . ." (App. C, pp. 117a, 118a). The district court also found "that claimant Elizabeth Dovydenas' gift was motivated by undue influence on the part of the debtor," and that she had "submitted to the overmastering effect of Stevens' influence on

behalf of TBS." (App. B, pp. 64a, 71a). That court therefore upheld "the bankruptcy court's conclusion that debtor-appellant TBS exerted undue influence *which resulted in* gifts of $6,581,356.26 by the claimant appellee . . . ." (App. B, p. 83a) (emphasis added). The statements and conduct on which the courts relied in finding undue influence, by TBS' own admission, did not involve any TBS religious beliefs or tenets. The courts' conclusions that the gifts "were the product of," were "motivated by," and "resulted" from petitioner's exertion of undue influence are therefore synonymous with a conclusion that the secular acts constituting undue influence were the "cause" of the gifts.

The court of appeals also applied a "but for" standard of causation, as evidenced by the following. First, in its reversal of the lower courts' findings with respect to the $1,000,000 gift, the court concluded that the lower courts "erred in finding that this gift was the result of undue influence." (App. A, p. 39a). Second, the court then upheld the rescission of the $5,000,000 gift, holding that respondent's decision to make the gift earlier than had been planned "was determined" by four acts of undue influence, none of which involved any religious belief of TBS. (App. A, p. 40a). Third, the court "agree[d] with the lower courts that [the $500,000] gift *was the result of* undue influence." (App. A, p. 42a) (emphasis added). Finally, applying the same principle of causation to the smaller gifts totaling $80,000, the court held that "plaintiff has failed to present a solid foundation of facts from which to find undue influence *was the cause* of these gifts." (App. A, p. 43a) (emphasis added). Reviewing the court of appeals' decision as a whole, therefore, it is clear that the court, like the lower courts before it, applied a standard of "but for" causation to respondent's claims of undue influence.

In the passage on which petitioner relies for its argument that the court of appeals did not apply the correct standard of causation, the court examined separately each of four factors found to have caused the $5,000,000 gift, and concluded that

any one of those acts standing alone might have been the cause of respondent's decision to make the gift. (App. A, pp. 41a-42a). The court made clear, however, that, in any event, the four factors, taken together, were the cause in fact of the $5,000,000 gift. (App. A, pp. 41a-42a) ("These facts lead inexorably to a finding of undue influence."). *See also* App. A, at pages quoted above and at p. 46a) ("The five million dollar gift and the half million dollar gift . . . were both nurtured and brought to fruition by misstatements and distortions of facts . . . .").

Reasons the Writ Should Be Denied

I. The Decision Of The Court Of Appeals Does Not Raise Any Important Question Of Federal Law Nor Does It Present Any Other Reason For The Grant Of Certiorari.

Five judges of three federal courts have reviewed this case and unanimously concluded that petitioner's conjuring up of a First Amendment issue is illusory. Rather, the courts have agreed that this case presents nothing more than the ordinary application of state common law. TBS' testimonial admissions that the statements constituting undue influence were not among its religious beliefs forever put to rest any possible constitutional argument it could make. TBS' own testimony removed any federal law issue from this case, and all three lower courts properly decided the case on the basis of applicable state law. TBS should not be allowed to obtain review in this Court by taking a position contrary to its own trial testimony. Having itself eliminated all issues of federal law from the case, TBS cannot genuinely argue now that the case presents any issue worthy of this Court's review.

This case is *sui generis* and TBS has not shown otherwise. TBS cites no conflict with any opinion of any federal or state trial courts, let alone any court of appeals, highest state court

or opinions of this Court. Nor does TBS cite any cases at all which support the novel interpretation of the First Amendment which it urges this Court to adopt. Indeed, to the contrary, the rulings by the courts below in this case are directly supported by a recent ruling of the California Supreme Court in *Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1114-15, 1124-25, 762 P.2d 46, 58, 64-65 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989), review of which this Court recently denied. In *Molko*, the California Supreme Court ruled that an undue influence claim for rescission of a religiously-motivated gift could be asserted against a church without violating the First Amendment even where liability was based on statements which were central tenets of the particular faith involved. *Id.* Thus, TBS' petition should be denied because this case involves no issue of federal law that is in need of resolution by this Court.

A. *The First Amendment Is Not Involved In This Case Because The Courts' Rulings Do Not Infringe, By TBS' Own Admission, Sincerely-Held Religious Beliefs.*

All three courts below (including a unanimous panel of the court of appeals) concluded that the First Amendment does not apply to Mrs. Dovydenas' claim against TBS because the First Amendment does not provide any immunity or special privilege to religious officials for secular statements made by them for the purpose of inducing contributions. (*See* Opinion of the United States Bankruptcy Court, Appendix C, pp. 119a-131a; Opinion of the United States District Court, Appendix B, pp. 71a-81a; Opinion of the First Circuit Court of Appeals, Appendix A, pp. 43a-46a). The conclusion of these courts is correct. This case does not in any way infringe the rights of TBS to hold or pursue its religious beliefs. Neither Mrs. Dovydenas nor the courts below has challenged the religious beliefs of TBS. There has been no issue raised con-

cerning the truth or validity of any of TBS' religious beliefs. The rulings of the courts below have not attacked the practices of evangelism, religious solicitation or personal visitation of TBS nor have they limited good faith efforts of TBS to persuade parishioners to make donations or to persuade non-believers to convert to its religion. Rather, the courts below have merely limited the ability of a religious leader to extract money unfairly and unlawfully from a parishioner through a pattern of fraudulent and coercive conduct which, TBS admits, is not related to any religious belief of the organization. This redress of such unlawful conduct infringes no First Amendment rights.

This Court has made clear that the First Amendment's protections are not invoked unless the state interferes with a religious, as opposed to a secular, belief and that belief is sincerely-held. Indeed, in all First Amendment cases, the first inquiry is whether the state has interfered with a person's words or actions which are based upon a sincerely-held religious belief. If the words or actions are secular and not part of a sincerely-held religious belief, the First Amendment simply does not apply. *E.g.*, *Frazee* v. *Illinois Department of Employment Security*, 109 S. Ct. 1514, 1517 (1989); *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 713 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972); *United States* v. *Seeger*, 380 U.S. 163, 185 (1965); L. Tribe, *American Constitutional Law* § 14-12, at 1242 (2d ed. 1988). *See also Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1114-15, 762 P.2d 46, 58 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989).[1]

[1] If a sincerely-held religious belief is involved, government interference can still be justified provided that it serves a compelling state interest and there is no less restrictive alternative. *Bob Jones University* v. *United States*, 461 U.S. 574, 603-04 (1983); *Sherbert* v. *Verner*, 374 U.S. 398, 406-08 (1963); *Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1112-13, 762 P.2d 46, 56-57 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989). *See* discussion *infra* above at pp. 12-20.

In this case, the First Circuit Court of Appeals concluded that Mrs. Dovydenas' decision to make the $5,000,000 gift earlier than she had planned was caused by four factors which the court found were "secular statements and actions." (App. A, pp. 40a-41a, 45a). These four factors are: (1) the deliberate fostering by Stevens and other members of TBS of Mrs. Dovydenas' belief that her gift of $1,000,000 had cured Stevens' wife's headaches when, in fact, the headaches continued and Stevens and the other members knew it; (2) Stevens' influencing Mrs. Dovydenas not to tell her husband or family about her gifts by telling her that her husband and family were controlled by Satan, which Stevens admitted at trial was not a religious belief of TBS; (3) the deliberate misrepresentation by Stevens and his wife that a member of TBS was being held in Rumania at great danger to his life, and encouragement of Mrs. Dovydenas to give $5,000,000 to TBS to effectuate his release, when both knew that he had already been released and was in no danger; and (4) Stevens' prevailing upon Mrs. Dovydenas to write a letter falsely stating that no one from TBS had asked her to make the $5,000,000 gift or knew that she was going to make it, when both Stevens and his wife knew about the gift before it was made and accelerated its delivery. (App. A, pp. 40a-41a).

In its Petition, TBS argues that the First Amendment is involved here because each of these four factors "was understood by the parties to have a significant religious dimension." (Petition, p. 19). This is a misstatement of the evidentiary record. The first and third factors are obviously misstatements of secular facts and were not based on the religious beliefs of TBS, and the fourth factor was deceptive secular conduct which also was not based on the religious beliefs of TBS. Indeed, in its Petition, TBS does not even attempt to explain how any of these three factors had a significant religious dimension. (Petition, p. 19). Finally, the second factor, while "religious-sounding," is also not based on any religious beliefs of TBS. Stevens specifically admitted at trial that it is not part of the

religious beliefs of TBS that outsiders are controlled by Satan or that outsiders should be lied to. (App. C, pp. 121a-122a). TBS cannot now attempt to recast the import of this binding admission.[2]

Thus, as the courts below concluded, the First Amendment is not implicated in this case because the statements constituting undue influence were not part of the sincerely-held religious beliefs of Stevens or TBS. TBS urges the Court to extend the First Amendment beyond its traditional protection of only sincerely-held religious beliefs and to announce a novel rule that even in an undue influence case where the church's liability is premised exclusively on secular statements, the First Amendment requires that a special burden of proof and proof of causation be applied. TBS bases this argument on its First Amendment right to receive religiously-motivated donations. (Petition, p. 15). Specifically, TBS argues that under the First Amendment, rescission of a religiously-motivated gift should be allowed, in a claim against a church for undue influence based on admittedly secular statements, only if the parishioner can prove by clear and convincing evidence that, but for the secular misrepresentations and misdeeds, the gift would not have been made. (Petition, pp. 17-18, 25-26). As is discussed below, this contention should be rejected because it is both unprecedented and unsound. Further, this is not an appropriate

[2] Indeed, the petitioner's argument that the Court should probe behind Stevens' testimonial admissions to determine what are and are not religious beliefs of TBS invites review that is itself problematic under the First Amendment. The doctrine of ecclesiastical abstention requires a court to accept at face value the pronouncements of the highest authority of a religious institution concerning ecclesiastical matters, including the religious beliefs of the institution. *See Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Watson* v. *Jones*, 80 U.S. (13 Wall) 679 (1872). *See also Lyng* v. *Northwest India Cemetery Protective Association*, 485 U.S. 439, 108 S. Ct. 1319, 1329-30 (1988) (Court will not "rule that some religious adherents misunderstand their own religious beliefs"); L. Tribe, *American Constitutional Law*, § 14-11, at 1237-42 and § 14-16, at 1298 (2d ed. 1988). Here, the petitioner voices no doubt that Stevens, as the highest ecclesiastical authority of TBS, testified that the statements he made to the respondent were not religious beliefs of TBS, thereby precluding further inquiry into the matter.

case for this Court to decide whether such a special rule should be created, for it is clear that the courts below found, on the basis of clear and convincing proof, that Mrs. Dovydenas' gifts of $5,500,000 would not have been made but for the secular statements and actions of TBS constituting undue influence.

B. *Even If The First Amendment Were Implicated In This Case, There Would Be No Important Or Unclear Issue Of Federal Law Which Needs To Be Resolved.*

Even if all three lower courts were wrong in concluding that this case does not involve any sincerely-held religious beliefs of TBS, the courts' decisions are fully consistent with decisions of this Court holding that religious conduct, as opposed to religious beliefs, may constitutionally be subject to state regulation. This Court has made clear that while the freedom to believe in a religion is absolute, the freedom to act pursuant to that belief is not, and may be regulated for the protection of society. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940). Thus, even in cases where the First Amendment is involved, this Court has held that the State may justify interference with a person's religious freedoms provided that the state interference serves a compelling state interest and there is no less restrictive alternative available. *Bob Jones University* v. *United States*, 461 U.S. 574, 603-04 (1983); *Sherbert* v. *Verner*, 374 U.S. 398, 406-08 (1963).

The First Amendment has not been violated in this case because ordering rescission of Mrs. Dovydenas' gifts on account of TBS' undue influence serves a compelling state interest which cannot be adequately protected through a less restrictive alternative. The Commonwealth of Massachusetts has an obviously fundamental interest in protecting its citizens from fraud and coercive conduct, and in ensuring that its citizens part with their assets only of their own free will. *See, e.g.*, *Bowen* v. *Roy*, 476 U.S. 693, 709 (1986) (goal of prevent-

ing fraud in social security benefits programs is compelling governmental interest sufficient to override free exercise claim); *Sherbert* v. *Verner*, 374 U.S. 398, 407 (recognizing that a least restrictive alternative analysis would be required if statute concerned state's interest in preventing fraud); *International Society for Krishna Consciousness, Inc.* v. *Barber*, 650 F.2d 430, 444-45 (2d Cir. 1981) (prevention of fraud is compelling state interest which can overcome free exercise rights); L. Tribe, *American Constitutional Law*, § 14-13, at 1273 (2d ed. 1988). *Cf. Schneider* v. *State*, 308 U.S. 147, 164 (1939) (recognizing prevention of fraud could overcome free speech rights of Jehovah's witness who was distributing religious literature without a permit); *Cantwell* v. *Connecticut*, 310 U.S. at 306 ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.").

Moreover, judicial rescission of a gift in an action for undue influence is the least restrictive alternative available for promoting this compelling and fundamental interest. Significantly, TBS cites no decision invalidating a judicial order or rescission based on an equitable doctrine designed to protect a compelling state interest such as the interest in preventing undue influence.[3] The typical free exercise case involves a state or local statute, regulation or ordinance which either involves impermissible prior restraints on potentially protected activities or, at the least, involves laws determined to be overbroad and not narrowly crafted to avoid governmental intrusion into constitutionally-protected conduct. *E.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 114 (1943); *Schneider* v. *State*, 308 U.S.

[3] The only case on point in fact concludes that liability for undue influence may be imposed against a church without violating the First Amendment even where the sole basis of liability is statements by church members which were found to be sincerely-held and central tenets of the particular faith involved. *Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1114-15, 1124-25, 762 P.2d 46, 58, 64-65 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989).

147 (1939); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). In many of these cases, while this Court has struck down prior restraints or overly broad laws, it has reasoned that after-the-fact judicial enforcement of a law punishing fraud would be constitutionally permissible in the face of claims of free exercise or free speech rights. *E.g.*, *Schneider*, 308 U.S. at 164; *Village of Schaumburg*, 444 U.S. at 637. *See also Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 56 U.S.L.W. 4869, 4873 (June 29, 1988) ("In striking down this portion of the Act, we do not suggest that states must sit idly by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it."); *International Society for Krishna Consciousness, Inc.* v. *Barber*, 650 F.2d at 446 ("resort to the penal laws, which punish undesirable conduct after it occurs, is a more appropriate response to . . . misconduct than a sweeping prohibition on all solicitation, fraudulent and nonfraudulent").

Thus, this Court has recognized that after-the-fact judicial enforcement of laws aimed directly at fraudulent conduct provides a "least restrictive alternative" sufficient to overcome First Amendment challenge. Judicial enforcement of the doctrine of undue influence against a religious institution therefore does not violate the right to the free exercise of religion.

Indeed, actions for rescission of gifts on the grounds of undue influence are peculiarly inoffensive to free exercise rights. Unlike tort actions where plaintiffs seek compensatory or, especially, punitive damages, an undue influence action results only in rescission of a transaction, restoring the parties to the *status quo ante*. Neither is it designed to, nor has it the effect of, punishing unlawful conduct; it merely undoes a transaction which the law, for reasons of fairness, treats as voidable. *See supra* pp. 45-46. There is no danger of a "chilling effect" comparable to that present in a defamation case, where damages may be unlimited, or an obscenity case where

criminal sanctions may be imposed. In short, the remedy of rescission in an undue influence case imposes the smallest burden possible on arguably protected conduct while promoting the state's compelling interest in preventing fraud and coercion.

Further, far from representing an "unstructured" cause of action, as TBS has argued (Petition, p. 16), the claim of undue influence is a highly-focused one. The legal standards for undue influence, which the lower courts applied, are clearly defined and unambiguous. The following elements must be shown: (1) a person who is susceptible to influence; (2) the fact of deception practiced or improper influence exerted; and (3) submission to the overmastering effect of such unlawful conduct. *Miles* v. *Caples*, 362 Mass. 107, 112, 284 N.E.2d 231 (1972). In addition, the courts below applied the rule that there must be a solid foundation of established facts to support an inference of undue influence. (App. A, pp. 37a, 42a). *See Neill* v. *Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920). There was nothing "unstructured" about the courts' findings that Stevens lied to Mrs. Dovydenas and improperly influenced her to give money to TBS, and that she submitted to the overmastering effect of his conduct. The detailed factual findings of all three lower courts, and their careful application of these clear legal standards, represent precisely the type of narrow, confined and fact-specific inquiry which eliminates any perceived threat or burden to religion.

Accordingly, TBS' liability for undue influence in this case should be upheld because it serves a compelling state interest that cannot be satisfied through a less-restrictive alternative. This Court should reject TBS' attempt to interpret the First Amendment as requiring a special standard of causation or burden of proof in undue influence cases involving religiously-motivated gifts because such a standard is both unsound and unprecedented. TBS does not, and cannot, cite any authority for this special standard of causation or burden of proof in undue influence claims against the clergy. To the contrary,

courts have applied the same standards of causation and burden of proof to claims against religious institutions as they have to claims against others. *See, e.g., Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1124-25, 762 P.2d 46, 64-65 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989); *Nelson* v. *Dodge*, 76 R.I. 1, 68 A.2d 51 (1949); cases cited in Annotation, *Undue Influence in Nontestamentary Gifts to Clergyman, Spiritual Advisor or Church*, 14 A.L.R.2d 649 (1949). *Cf. SEC* v. *World Radio Mission, Inc.*, 544 F.2d 535, 537 n. 3, 539 and n. 7 (1st Cir. 1976) (in action against church for violation of the federal securities laws in sale of securities by church, court concluded that fact that investors had religious motives was "irrelevant" and did not require special proof that but for the fraudulent secular statements, religiously-motivated investments would not have been made).[4] Indeed, in *Molko*, the Supreme Court of California held that a church could be liable under traditional undue influence standards even where the statements constituting the undue influence were found to be sincerely-held and central tenets of the particular faith involved. *Molko*, 762 P.2d at 58, 64-65. This case presents an even more compelling circumstance for applying the traditional standards than did *Molko* because liability is premised exclusively on secular statements and actions.

Furthermore, the state's legitimate interest in ensuring that its citizens part with their assets only of their own free will would be substantially undermined by any heightened causa-

[4] Respondent notes that the standard for causation in undue influence claims has not been specifically described by the Massachusetts courts. In any event, it should be no more stringent than that applied in analogous common law fraud claims. *See Restatement (Second) of Torts* § 546 and Comment(b) (1964) (plaintiff in fraud claim is not required to establish that the misrepresentation was the exclusive or even the predominant factor in determining a person's conduct, but need only show that the misrepresentation was a substantial factor in influencing her decision). Similarly, while the burden of proof has not been specifically addressed, it appears that the preponderance of evidence standard governs provided that there is a solid foundation of established facts. *Neill* v. *Brackett*, 234 Mass. at 370, 126 N.E. at 94.

tion standards or burden of proof in undue influence cases for rescission of religiously-motivated gifts. The state is legitimately entitled to prevent the clergy, as well as all other persons, from exercising fraud or coercion to obtain donations, gifts or transfers of property. Claims for undue influence, as traditionally applied by the courts, can be very difficult to prove because plaintiffs are often unable to present direct evidence of any exertion of undue influence and are forced to rely instead on inferences based on such meager circumstantial evidence as the donor's age, the donor's relationship to the donee and the fact of the gift. *E.g.*, *Miles* v. *Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *Heinrich* v. *Silvernail*, 23 Mass. App. Ct. 218, 229, 500 N.E.2d 835, 843 (1986). If heightened burdens of proof or standards of causation were required, the state's ability to prevent undue influence could be substantially undermined. Moreover, balancing the state's interest against the church's interest, it is clear that application of the traditional undue influence standards will not impose any undue burden on the ability of religious institutions to solicit and receive donations. Indeed, the fact that the traditional standards have been applied for decades in cases against the clergy without controversy demonstrates that they impose no undue burden and create no chilling effect.

Finally, creating a special standard of causation or burden of proof in undue influence claims against the clergy would constitute a special preference for the clergy violative of the First Amendment's Establishment Clause. It would, in effect, create a special privilege for the clergy to exercise fraud, moral coercion and perhaps even physical coercion to extract money from its religiously-motivated parishioners. While the government may sometimes relieve the clergy from governmentally-imposed burdens on religious grounds, it is not entitled, in the name of religion, to confer special benefits on religious institutions. *E.g.*, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

II. There Is No Need To Reach TBS' Arguments That This Court Should Require Special Causation And Burden Of Proof Standards In Undue Influence Claims Against The Clergy Because Those Standards Were Met In This Case.

This Court need not address whether a heightened burden of proof or proof of causation is required because, in this case, a review of the facts and the rulings of each of the lower courts reveals beyond doubt that Mrs. Dovydenas proved by clear and convincing evidence that her gifts would not have occurred but for the undue influence by TBS. First, with regard to causation, each of the courts below applied a "but for" standard. The bankruptcy court expressly found that Mrs. Dovydenas "was a marionnette at the end of a number of strings manipulated by Stevens," that Stevens had "complete ascendancy" over her, that she "submitted to the overmastering effect of this influence," and that "[her] gifts were the product of undue influence exercised upon her by the church through Stevens." (App. C, pp. 117a-118a). Similarly, the district court found "that claimant Elizabeth Dovydenas' gift was motivated by undue influence on the part of [TBS]" and that Mrs. Dovydenas had "submitted to the overmastering effect of Stevens' influence on behalf of TBS." (App. B, pp. 64a, 71a). The district court thereafter upheld "the bankruptcy court's conclusion that debtor-appellant TBS exerted undue influence *which resulted in* gifts of $6,581,356.26 by [Mrs. Dovydenas] . . . ." (App. B, p. 830) (emphasis added).

The court of appeals also applied a "but for" standard of causation. This is evidenced by its findings with respect to all gifts: (1) with regard to the $1,000,000 gift the court found that "[the lower courts] erred in finding that this gift was the result of undue influence"; (2) with regard to the $5,000,000 gift, the court held that Mrs. Dovydenas' decision to make that gift earlier than had been planned "was determined" by four secular acts of undue influence; (3) with regard to the

$500,000 gift, the court found that "[this] gift was the result of undue influence"; and (4) with regard to smaller gifts totalling $80,000, the court held that Mrs. Dovydenas "has failed to present a solid foundation of facts from which to find undue influence *was the cause of* these gifts." (App. A, pp. 39a, 40a, 42a, 43a) (emphasis added). Thus, reviewing the Court of Appeals' decision as a whole, it is clear that this Court, like the lower courts before it, applied a standard of "but for" causation to respondent's claims of undue influence.

The language in the court of appeals' opinion relied upon by TBS also supports this conclusion. (Petition, pp. 10, 18; App. A, pp. 41a-42a). In that passage, the court of appeals was examining separately the potential effect of each action of undue influence and concluded that each, standing alone, may have caused the gift. (App. A, pp. 41a-42a). The court also made clear, however, that all four factors, viewed together, certainly caused the gift to be made. (App. A, pp. 41a-42a) *(see also* App. A, p. 46a).[5]

[5] With regard to the $5,000,000 gift, the court of appeals suggested that TBS' undue influence both (1) caused the gift to be made earlier than originally planned (App. A, pp. 40a, 41a) and (2) caused the gift to be made at all. (App. A, pp. 41a, 46a). Whether TBS' undue influence caused a gift to be made at all or caused a gift planned for some time in the future to be made immediately is irrelevant to Mrs. Dovydenas' right to rescission. In either event, she is entitled to rescission if it was the undue influence which caused the money to be transferred at the time that it actually was transferred to TBS. Further, the court of appeals made clear that TBS' undue influence had already begun before Mrs. Dovydenas decided to make a second gift of $5,000,000, and that her decision to make that gift was tainted by that undue influence. *(See* App. A, pp. 15a, 17a). ("After the [first gift of] $1,000,000, Stevens, [Stevens' wife] and another church member each told plaintiff that [Stevens' wife's] headaches were cured because of the gift. In fact, [Stevens' wife] continued to suffer from migraines, but this was kept from plaintiff. Because she had been told by Stevens, [Stevens' wife and the other church member] that [Stevens' wife's] headaches had been cured, [Mrs. Dovydenas] believed that large gifts by her to TBS could effect events on earth . . . . In March, 1985, plaintiff told Stevens that she had heard God tell her to give $5,000,000 to TBS in June."); (App. A, p. 41a) ("If plaintiff had been told that [Stevens' wife's] headaches had not been cured by her first gift of $1,000,000, she may not have made the second gift [of $5,000,000] at

Finally, the opinions of the lower courts also reveal that they required "clear and convincing" proof that the undue influence caused the gift. The court of appeals concluded that the facts lead "inexorably" to a finding of undue influence and that there was "solid foundation of evidentiary facts" on which to base liability. (App. A, pp. 41a-42a). Similarly, the bankruptcy court emphasized that there was "ample evidence of undue influence" and that the evidence clearly revealed that Mrs. Dovydenas was "a marionette at the end of a number of strings manipulated by Stevens." (App. C. pp. 108a, 117a).

In sum, in this case, the lower courts' imposition of liability does not raise any First Amendment concerns because their findings of liability were premised on admittedly secular acts and statements. Further, the lower courts applied the "but for" standard of causation and their findings of undue influence are supported by clear and convincing evidence. Accordingly, in the circumstances of this case, it is clear that even if First Amendment rights are involved, imposing liability on TBS serves a compelling state interest which cannot be adequately redressed by any less restrictive alternative.

III. This Is Not An Appropriate Case For The Court To Address Whether The *De Novo* Standard Of Review Of *Bose Corporation* v. *Consumers Union Of United States, Inc.*, 466 U.S. 485 (1984) Applies To Free Exercise Cases.

In *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984), this Court concluded that determinations of "actual malice" in public figure defamation cases

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all."); (App. A, p. 46a) ("The five-million dollar gift and the half-million dollar gift might have had their seeds in the religious beliefs of plaintiff, but they were both nurtured and brought to fruition by misstatements and distortions of facts that had no basis either in the religious tenets of TBS or the plaintiff's religious beliefs.").

are subject to *de novo* review on the issue whether "actual malice" had been shown. TBS has relied upon *Bose* to argue that the Bankruptcy Court's findings should be subject to *de novo* review because this is a case involving the free exercise clause of the First Amendment. (Petition, p. 23). As the court of appeals reasoned, however, the applicability of *Bose* need not be reached because this case does not involve TBS' First Amendment rights. *(See* App. A, p. 8a).

Moreover, even if the First Amendment were involved in this case, TBS' argument that this case is governed by the standard of review set forth in *Bose* need not and should not be addressed by this Court for several reasons. First, as reasoned by the district court in this case, assuming *arguendo* that *Bose* applies to free exercise cases, *Bose* does not require *de novo* review of the credibility of witnesses. (App. B, pp. 61a-63a). *See Bose* 466 U.S. at 498-501. In this case, findings on credibility were critical to the resolution of Mrs. Dovydenas' claims.

Second, the petitioner's claim that *Bose* applies to issues involving the free exercise of religion is not supported by prior free exercise and establishment clause cases of this Court. *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) and *Lynch* v. *Donnelly*, 465 U.S. 668, 681 (1984). In fact, prior cases indicate that *de novo* review is improper and that the governing standard is the clearly erroneous standard. *Id.*

Third, there is no "constitutional fact" similar to the finding of "actual malice" at issue in *Bose* to which the *de novo* standard of review should be applied.[6] Fourth, both the district court and the court of appeals engaged in a careful review of the entire record. *(See* App. A, p. 7a; App. B, p. 63a). Thus, three courts have now agreed, after reviewing the entire record, that the petitioner obtained $5,500,000 in gifts from the respondent as a result of undue influence. In these circum-

[6] Indeed, the only arguable constitutional fact is whether the statements constituting undue influence were part of the religious beliefs of TBS, and, as noted above, Stevens admitted at trial that they were not.

stances, a *de novo* review is not necessary and certainly would not result in a different conclusion. *Cf. Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (where two courts are in agreement on factual findings, the standard of review in a third court is particularly narrow.).

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-1977

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In The

Supreme Court of the United States

October Term, 1988

In Re:

THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

-against-

ELIZABETH DOVYDENAS,

Respondent.

On a Petition For a Writ of Certiorari to The United States Court of Appeals For The First Circuit.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

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Rule 22.5 limits a reply brief to arguments "first raised in the brief in opposition." Accordingly, petitioner refrains from further discussion of such questions as the appropriate standard of review, or even of petitioner's startling assertion that the

court below did in fact apply a "but for" causation test.[1] This reply is confined to a single question, namely, respondent's factual (opp. pp. 2 - 3) and legal (opp. pp. 6 - 9) claim that no first amendment issue is presented because the statements and conduct on which respondent relies were not part of the church's sincerely held religious beliefs.

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1 It is significant, however, that respondent nowhere quotes the language of the court below relied on by petitioner. Compare opp. pp. 4 - 5 and pp. 16 - 17 with petition for certiorari, pp. 10, 16 - 19.

ARGUMENT

The Constitution Forbids Rescission on the Basis of Judicial Inquiries Into Sincerity.

Three responses to respondent's argument are in order.

First. No "sincerity" issue is raised by the ruling of the court below. Respondent's only record reference is to several unfocussed sincerity "findings" made by the bankruptcy judge (opp. pp. 2 - 3). Respondent's additional reference to the district court's opinion is immaterial because that court did no more than apply "clearly-erroneous" review. See pet. for cert. at p. 5. Most significantly, respondent makes *no* reference whatsoever to the opinion of the court of appeals. See opp. pp. 2 - 3. Nor could she. That court categorically abjured any inquiry into petitioner's sincerity:

> Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS or the beliefs of its adherents. *The findings* and rulings *rest solely on secular statements* and actions. *The facts* relied upon *have not been derived from an inquiry* into the religious principles of TBS or the truth and *sincerity of its adherents'* beliefs. There has been no inquiry as to whether Stevens and the other TBS adherents were acting in

> accord with what they perceived to be the commands of their faith . . .

869 F. 2d at 845: App. p. 45a, quoted in petition at pp. 11 - 12 (italics supplied).

Second. No decision of this Court in fact permits inquiry into the sincerity of the beliefs of a religious solicitor. *United States v. Ballard*, 322 U. S. 78 (1944), does not resolve the issue. See pet. for cert. at 21 - 22.[2] Moreover, the courts and commentators have uniformly recognized the intractable dangers inherent in sincerity inquiries. *E.g., Gillette v. United States*, 401 U. S. 437, 455 - 57 (1979). Professor Tribe, who was listed among respondent's counsel in the court below, states that the arguments against judicial inquires into sincerity "are most convincing when government seeks to protect gullible citizens from fraudulent religious claims, since protection from the "wrong" of mental and spiritual poison is precisely what the Constitution put beyond the prosecution's reach" L. Tribe, *American Constitutional Law*, Section 14 - 12, p. 1245 (1987). See also pet. for cert. at 21 - 22. More recently Judge Noonan, a highly regarded commentator on the relationship between law and religion, has extensively explored the dangers to religious liberty in permitting sincerity inquiries. Noonan, *How Sincere Do You Have To Be To Be Religious*, 1988 U. of Ill. L. Rev.

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[2] The petition for certiorari demonstrated that one of the difficulties in the court's "secular/religious approach" is that, all too frequently, it is tantamount to sanctioning a direct inquiry into petitioner's sincerity *vel non*.

713.[3] Judge Noonan correctly notes the propensity of sincerity inquiries to lead into an inquiry into religious doctrine: "Sincerity of belief is difficult to discriminate from the content of belief." *Id.* at 722. This danger is not speculative; inquiry into the church's religious beliefs occurred in this case. See pet. for cert. at pp. 18 - 19.

It is, of course, widely acknowledged that the dangers posed by sincerity inquiries may be an unavoidable necessity when independent, third party interests are at stake. See for example, *Gillette v. United States, supra*; *Frazee v. Illinois Dept. of Employment Security*, 109 S. Ct. 1514, 1517 (1989). But no such countervailing third party interest exists here; only the interest of the church and one of its donors is at issue. See pet. for cert. at 21 - 22.

Third. The court below repeatedly acknowledged that respondent's gifts were religiously motivated. See pet. for cert. at p. 14. Respondent's $5 million gift was made by a "born-again-Christian," a believer thoroughly saturated with church and teachings as a result of reading church pamphlets, attending Bible classes, listening to sermons and tapes of church leaders, and interacting with fellow believers in a large and vibrant religious community (p. 11 n. 7). Her gift was the product of

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3 Among other things, Judge Noonan directs attention to the difficulties in determining how to go about measuring sincerity; he observes that sincerity inquiries erroneously proceed on the basis of a "literal minded" conception of religious truth; and he notes that sincerity inquiries wholly fail to deal with the situation of the clergyman who deviates from or has doubts about some or all of the doctrine. *Id.* at 718 - 19.

her whole experience, and the gift was used for the very purposes she designated. To permit rescission of such a religiously motivated gift on the basis of a judicial determination that the donor's will was "overcome" because some of the donor's religious experiences may have been affected by the insincerely held beliefs of others is to license a judicial inquiry of a truly alarming nature. Courts would be authorized to sort through a religious teacher's numerous teachings and determine which were sincere and which were not.[4] Then the court would engage in a similar mind probe of the donor, with a view towards disaggregating the various and innumerable influences upon the donor, separating out the "authentic" religious inputs from the "inauthentic" inputs, and then assigning weights to each in the donor's decisional process. Argument or citation cannot make plainer that such ill-defined, after-the-fact, judicial determination threatens the right of all religious communities to preach, teach doctrine and to receive donations. Such inquiries contravene both religion clauses and should never be allowed, as the *amicii* demonstrate.[5] Surely, at an absolute minimum, the constitution precludes rescission absent the most cogent proof of

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4 No one suggests that the church and its pastors believed *none* of what they taught petitioner. To permit rescission here because of a conclusion that the church leaders did not believe *some* of their statements would render a wide range of gifts vulnerable to rescission for fraud or undue influence. As Judge Noonan put it, "Let us examine how a priest or minister accepting much of modern biblical criticism would fare if a sincere belief in everything were necessary for constitutional protection." (*Id.* at 720)

5 See *Brief for the National Council of the Churches of Christ in the U.S.A. and Council on Religious Freedom as Amici Curiae in Support of Petitioner*, pp. 5 - 12.

but-for causal connection between the allegedly "insincere" statements and the donor's decision to make the gifts.

* * * *

Respondent's effort to recast the court of appeals' opinion is simply one illustration of the routine strategy of respondents seeking to characterize a petition for certiorari as entirely fact-bound. Of course, every case will have its own fact pattern. But the core facts are clear here: respondent made religiously motivated gifts to this church, the gifts were used for the purposes she directed, and her rescission suit has shattered this religious community. More importantly, the questions raised by the petitioner are general in nature. Indeed, respondent's opposition is itself testimony to the need for guidance from this Court on the limits the constitution imposes on rescission suits brought by deprogrammed and now apostate church members.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 14, 1989

Respectfully submitted,

s/_____

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-against-

ELIZABETH DOVYDENAS,

Respondent.

BRIEF OF THE OLD-TIME GOSPEL HOUR AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The Old-Time Gospel Hour ("OTGH") submits this brief amicus curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit filed by The Bible Speaks, Inc. All parties to this suit have given OTGH written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The Old-Time Gospel Hour is a non-profit, religious, educational, and charitable organization that is an integral part of Thomas Road Baptist Church and its related ministries in Lynchburg, Virginia. Founded and led today by Reverend Jerry Falwell, these ministries include Liberty University, Lynchburg Christian Academy, the Liberty Godparent Ministry to pregnant women, evangelism ministries in the United States and abroad, radio and television broadcasting, and the Fundamentalist Journal and other publications. The ministries exist to spread the gospel of Jesus Christ and persuade men and women in every community of the world to accept Jesus Christ as their Lord and Savior. The ministries received over $100 million in gifts during the fiscal year ended June 30, 1989. In each of its recent fiscal years, Thomas Road Baptist Church and its related ministries received at least one gift of over $1 million from one or more individuals with whom Reverend Falwell has spent substantial amounts of time, and with whom he had become personally friendly before the gifts were given.

In his public and private teaching, counselling, and instruction, Reverend Falwell faithfully teaches and practices the Biblical commands that Christians should give both tithes and offerings in support of the work of God's kingdom. While Reverend Falwell is careful in all of his public and private relationships to respect the stewardship that God has given to those who support Thomas Road Baptist Church and its related ministries, the experience of The Bible Speaks in this case demonstrates that donors, who may become disaffected for a variety of reasons unrelated to the manner in which the ministry has been conducted, occasionally attempt to reclaim large gifts, alleging they were obtained by undue influence.

The Old-Time Gospel Hour believes that, to allow a donor to reclaim a gift to a church or religious organization without proof by clear and convincing evidence that it would not have been given but for the undue influence exerted by the donee, violates the donee's rights under the First Amendment's Free Exercise Clause and cannot be permitted by the Court.

QUESTIONS PRESENTED AND STATEMENT OF THE CASE

The Old-Time Gospel Hour adopts the questions presented and statement of the case as set forth in the petition for certiorari filed by The Bible Speaks, Inc. ("TBS").

ARGUMENT

America is a religious nation. As the late Justice Douglas said well,

> We are a religious people, and our institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

Zorach v. Clauson, 343 U.S. 306, 313 (1952). The vitality of Justice Douglas' statement is nowhere more evident than in the First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise [of religion]". Passionate and devoted religious belief and practice pervades the history of the founding of our nation, fuels many of the social controversies that preoccupy Congress and the courts, and inspires the lives of millions who, like Elizabeth Dovydenas, are faithful members of and contributors to local churches in every community of America. Thus it is that this Court should be especially watchful of the Free Exercise rights of those who act on the basis of their religious beliefs.

Because it shares TBS' belief that TBS' Free Exercise rights have been denied by the courts below, The Old-Time Gospel Hour strongly agrees with and supports TBS' petition for certiorari. OTGH believes that the petition accurately sets forth the material facts necessary for the Court to understand and review the decision of the Court of Appeals; delineates the errors of law committed by the lower courts; and persuasively argues why this Court should

establish clear standards for application of the law of "undue influence" to gifts to churches and other religious organizations.

The passion of religious belief, derived from the believer's service of a higher Person or Cause and from its usually inherent unified world and life view, often leads the believer to make statements or take action which would be considered by an infidel to be irrational, illogical, or untrue. Kamikaze pilots served the divine emperor of Japan; in Martin Luther's day, thousands purchased "indulgences" to free souls from purgatory; Jesus Christ allowed himself to be crucified.

Unquestionably, it is unusual for a wealthy young woman, 34 years old, to adopt new religious beliefs, become estranged from her husband, and make large gifts of a substantial portion of her wealth to a small and newly-established church. To some, it may be illogical or irrational for her to make such gifts without seeking the advice of supposedly sophisticated tax and financial counsellors, and against the wishes of her husband and her father. Many of the same people think it untrue that gifts of money may have, by some supernatural means, *apparently* unrelated effects, such as the cure of headaches in another, or the release of someone from official custody.

To the believer, however, these are all religious sacrifices whose supernatural benefits are beyond the explanation of modern science or "objective" observers. The genius of the Free Exercise Clause is that it forbids the Congress, the state legislatures, and the courts, in all but the most compelling circumstances, *Hernandez v. Commissioner*, ___ U.S. ___, 57 U.S.L.W. 4593 (1989); *United States v. Lee*, 455 U.S. 252 (1982), from sitting in judgment over the truth, rationale, or logic of any religious belief, thereby removing the government from adopting any heresy, dogma, or sect. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

With this background in mind, we turn to the need for the Court to act in this case to protect TBS' Free Exercise rights, and to establish standards for courts to use in deciding future cases. The court below may not impose a significant burden on TBS' Free Exercise rights without (1) justifying that burden by protecting a

compelling governmental interest and (2) considering whether a less burdensome means of protecting the same interest is available.

The law of undue influence is clear: (1) the donor must be a person susceptible to influence; (2) undue influence must have been exercised, by the donee or his agent; and (3) in making the gift, the donor must have submitted to the "overmastering effect" of the undue influence. *Bruno v. Bruno*, 384 Mass. 31, 422 N.E. 2d 1369 (1981); *McDonald v. McNeil*, 300 Mass. 350, 15 N.E. 2d 460 (1938); *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass App. Ct. 412, 402 N.E. 2d 76 (1980). The parties stipulated the susceptibility of Mrs. Dovydenas to influence, and *amicus* does not dispute the lower courts' conclusion that undue influence was exercised.

However, the Court of Appeals below imposed an intolerable burden on TBS by failing to apply the proper legal standard to determine whether, in making the $5 million gift, Mrs. Dovydenas submitted to the *overmastering effect* of the undue influence:

> If plaintiff had been told that Baum's headaches had not been cured by her first gift of $1,000,000, she *may not* have made the second gift at all. If she had not been influenced to keep the gift a secret from her husband and family, she *may not* have gone through with it. If she had been told that Turkia was in no danger, she *probably would not have* accelerated the gift.

The Bible Speaks, Inc. v. Dovydenas, 869 F.2d 628, 644 (lst Cir. 1989) (emphasis added), Appendix to Petition for Certiorari at *41a*.

Not only does this conclusive paragraph of the court's opinion concerning the $5,000,000 gift clearly demonstrate its failure to apply the proper legal standard, the passage also demonstrates the court's reliance on clearly religious factors, such as the family conflict arising out of Mrs. Dovydenas' religious beliefs, or the power of gifts to heal, to support its affirmance of the trial court.

The burden on TBS is clear: The decision below has stripped TBS of $5,000,000 worth of real estate — which Mrs. Dovydenas

specifically directed should be improved with her gift – and forced it to cease its operations

The less burdensome alternatives that the court below failed to adopt — or even consider — are equally clear. Before a court may require restitution of a gift to a church or religious organization, allegedly made as a result of undue influence, the plaintiff must demonstrate, by *clear and convincing evidence* –no less than is required to support a claim for restitution of property obtained by fraud — that the gift would not have been made *but for* the susceptibility of the donor to influence, *but for* the exercise of undue influence by the donor, and *but for* the donor's submission to the "overmastering effect" of that influence.

The need for the Court to rule in this case is further highlighted by the divergence between the "may not have" standard applied by the First Circuit and the "but for" rules traditionally applied in undue influence cases involving churches, *e.g.*, *Hensley v. Stevens*, 156 Mont. 486, 481 P.2d 694, 697 (1971) (transfer was "the product of undue influence"); *Guill v. Wolpert*, 191 Neb. 805, 218 N.W. 2d 224, 234 (1974) (insufficient evidence presented to show that *inter vivos* gift was "the effect of" undue influence); *Spence v. Griffin*, 236 Va. 21, 372 S.E. 2d 595, 599 (1988) (evidence sufficient to support ruling that *inter vivos* conveyance was "induced by actual fraud"). While this case does not present a traditional "circuit conflict," *Hernandez v. Commissioner, supra*, 57 U.S.L.W. at 4596, a less stringent standard of proof that may be satisfied by those who complain of undue influence cannot be applied only to gifts to churches without patently violating the Free Exercise Clause.

Churches and religious organizations of all kinds operate in many different ways. However, a common characteristic is the presence of a charismatic leader who is able to clearly and persuasively communicate the doctrine of the faith; and inspire the congregation and individual members to faithful action — including the provision of financial support — based on those doctrines. The Old-Time Gospel Hour is a ministry of Thomas Road Baptist Church, whose pastor is Reverend Jerry Falwell. By reason of the abilities God has given him, Reverend Falwell has been able,

publicly and privately, to exert substantial influence over both the church's congregation and those who read Old-Time's publications and listen to its radio and television programs. Many of these people have given substantial gifts to Thomas Road Baptist Church, The Old-Time Gospel Hour, and other related ministries. To permit the freely-given gifts of one who later turns away from the faith to be returned to the disaffected donor, merely because the donor *may not have* made the gift under different circumstances, tramples on the Free Exercise rights of churches and religious organizations across the country that teach their adherents the Biblical principle of giving tithes and offerings to support the ministry, and of giving liberally out of the wealth God has given them.

CONCLUSION

The Free Exercise Clause of the First Amendment stands as a faithful guardian of the rights of churches and their leaders to freely teach and practice their religious beliefs. No surer way to destroy the churches of America could be found than to permit the courts to strip them of gifts made for and used in their religious activities by allowing a wealthy, disaffected donor to reclaim a gift merely because, after being "deprogrammed," she presents some evidence that she may not have made the gift had she not been influenced by the church's teachings that God wanted her to use her wealth to benefit the church. The First Circuit's decision, by stripping the church of a substantial portion of its property without requiring plaintiff to prove that she would not have made the gifts to the church *but for* the undue influence exerted by its pastor, threatens the ability of any church to retain the gifts it receives and uses in its ministry.

For the foregoing reasons, along with those set forth in the petition for certiorari, The Old-Time Gospel Hour respectfully urges that The Bible Speaks' petition for certiorari be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

v.

ELIZABETH DOVYDENAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the First Circuit

---

BRIEF FOR THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AND COUNCIL ON RELIGIOUS FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The national religious bodies entering this brief as *amici curiae* are deeply concerned about the implications of this case, not only for The Bible Speaks, but for their own interests.

The National Council of the Churches of Christ in the U.S.A. is a cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the United States, having an aggregate membership of over 40,000,000. This brief does not purport to represent the views of all of those persons, but is based on policy determined by their representatives sitting as the Governing Board of the National Council of Churches, a deliberative body of about 250 persons, chosen by the member denominations in proportion to their size and support of the Council. The policy which underlies this action was expressed by the Board in 1955: "The National Council of Churches defends the rights and liberties of cultural, racial and religious minorities." Policy Statement: Religious and Civil Liberties in the U.S.A.

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The Council grew from the religious liberty concerns of the late John Hedrick whose substantial gifts to the Council, in large part, underwrote its formation and its continuing activities on behalf of religious freedom for all.

The objectives and purposes of the organization include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise, and responding to other areas

of concern which interfere with the full experience of religious freedom.

The Council is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity, and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion, whether that interference be from the executive, legislative, or judicial branches of the government.

Respondent's claims threaten the fundamental principles of freedom of religion and separation of church and state enshrined in the First Amendment. The matters respondent would have the courts regulate—solicitations for contribution to religious bodies and the contributions themselves—are inextricably intertwined with religious doctrine and are essential both to the existence of churches and to the individual's involvement in a religion.

Amici are appalled at the prospect that disgruntled members of any religious body could assert a cause of action that transforms the attractiveness a religious body once had for an adherent into a claim of undue influence, in order to permit that adherent to recover contributions the adherent made to that group. To permit such a claim to persist would be to place in jeopardy a religious body's ability to rely upon funds contributed to it, without which that body would be unable to pursue its religious activities.

Practically speaking, a precedent permitting dissident and alienated former adherents of a religious

body to go to court against that body and recover contributions made during the period of adherence would be terribly threatening for religious bodies. How would a religious body protect itself against such a threat, short of putting all of its contributed income in perpetual escrow, against the possibility that someday it might have to return those contributions to disaffected members?

Amici have no acquaintance with The Bible Speaks or its leadership and do not necessarily agree with their teachings nor approve their practices.

SUMMARY OF ARGUMENT

This case presents the crucial question of the extent to which the judicial branch of government may be utilized by a former adherent to a particular religious faith to recover religiously-motived church contributions, after later renouncing that faith by claiming "undue influence." In this case, respondent Elizabeth Dovydenas, a wealthy former member of The Bible Speaks Church, after undergoing a "religious deprogramming" during which time "exit counselors" altered her views toward her former church, filed an action to recover her previous contributions which contributions, had been utilized in the work of the church.

Permitting disgruntled former members of a religious body to maintain a cause of action for recovery of their earlier contributions to their church on the theory of "undue influence" places in jeopardy the religious body's ability to rely upon funds contributed to it without which that body would be unable to pursue its religious activities. Such an action requires a court to determine, in the religious domain, what

influence is or is not "due." To make such an assessment, a court necessarily becomes involved in adjudicating the religious validity of a church member's statements. It also requires civil courts to intrude into religious affairs.

This Court has repeatedly followed the principle that courts are prohibited from assessing the validity of any religious faith. However, only by assessing the validity of a religious belief may the Court discern what religious influence is or is not "due."

Amici believe that it is constitutionally inappropriate for a court to determine in retrospect whether a former church member's contribution was or was not motivated by her religious belief and whether a pastor's influence in encouraging such a contribution was or was not a valid religious expression. Permitting liability to be imposed in this case imposes on religious organizations a chill on their absolute First Amendment rights to teach their doctrine to, and receive contributions from, their membership without fear that the basic exercise of freedom of religion will subject them to trial in a court of law.

Amici believe that absent fraud or coercion and grave physical or mental disability on the part of a religious donor, the presumption should be that a person making a voluntary contribution to a religious organization has a right to make such a gift, and the organization receiving it to use it, without subsequent repudiation of intent and recovery of the gift.

ARGUMENT

THE QUESTIONS RAISED BY THE PETITION REGARDING THE RIGHT OF A FORMER ADHERENT TO A PARTICULAR RELIGIOUS FAITH TO USE THE COURTS TO RECOVER RELIGIOUSLY-MOTIVATED CHURCH CONTRIBUTIONS, AFTER LATER RENOUNCING THAT FAITH BY CLAIMING "UNDUE INFLUENCE" RAISES SERIOUS, BUT UNSETTLED, FIRST AMENDMENT CONCERNS FOR ALL RELIGIOUS BODIES THAT SHOULD BE ADDRESSED BY THIS COURT.

Petitioner, The Bible Speaks Church, is a small, fundamentalist Christian church. Respondent Elizabeth Dovydenas is a wealthy former member of that church who made substantial contributions to her church during the period of her membership. Mrs. Dovydenas was at all pertinent times a competent, married adult.

Respondent's family members became unhappy with her large church contributions and hired two so-called "exit counselors" to perform a religious deprogramming. Mrs. Dovydenas was lured away, under the pretense of a birthday celebration for her father, to a rented house in Minnesota where she underwent a week-long episode of religious faithbreaking. During this time she was shown videotapes about various cults during which her own religion was repeatedly put into question by the "exit counselors." This process resulted in respondent's views of her church being radically altered. Mrs. Dovydenas thereafter instituted this action for a return of her church contributions.

It is clear even from the facts found by the trial court—distorted as they may be—that respondent Dovydenas was enthusiastically caught up in the work of The Bible Speaks at the time she made two large

donations whose restitution this case involves. She decided to give $1,000,000 and later $5,000,000 to the work of The Bible Speaks on her own, without coercion or duress, while she was in complete control of her faculties. In the latter instance she was a thousand miles away from the church, with abundant opportunity to obtain independent advice, some of which was indeed vouchsafed to her by her husband, her financial advisers, her uncle, and her father, but which she deliberately and freely declined to follow.

Mrs. Dovydenas' decisions may not have been thought by her family or the fact-finder to have been wise, "prudent," or to have afforded the greatest possible tax advantage; but those considerations did not apparently weigh heavily with her, as indeed they often do not—perhaps *should* not—with people caught up in a consuming concern about the salvation of their souls or the coming of the Kingdom of God. Indeed, it is one of the common concerns of religion to free people from precisely such "prudent" pre-occupations with material possessions in order to open themselves to spiritual growth. The Gospel preached and supposedly believed by Christians has some radical advice about such matters:

> Do not lay up for yourselves treasures on earth, where moth and rust consume and where thieves break in and steal, but lay up for yourselves treasures in heaven, where neither moth nor rust consumes and where thieves do not break in and steal. For where your treasure is, there will your heart be also.

Matthew 6: 19-21, R.S.V.

Discerning whether Mrs. Dovydenas made donations to The Bible Speaks because of "undue influence" requires a court to determine, in the religious domain, what influence is or is not "due." To make such an assessment, the Court may, as here, become involved in adjudicating the religious validity of a church member's statements. The Court, however, cannot adjudicate the validity of the church member's statements without impermissibly evaluating religious doctrine and thus the validity of religious beliefs themselves.

An examination of this Court's decisions clearly demonstrates the strong prohibition against judicial decision making that intrudes into religious affairs. Civil courts have absolutely no authority to determine any matters of church government, faith, or doctrine. *Presbyterian Church v. Mary E.B. Hull Pres. Church*, 393 U.S. 440 (1969). As this Court has articulated, the design of the First Amendment reflects an awareness by the Fathers of the Constitution

> of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisioned the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. . . . "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted. . . ."

United States v. Ballard, 322 U.S. 78, 87 (1944) (citations omitted). Based upon such a recognition, the First Amendment precludes judicial determinations of "the truth or verity of religious doctrines or beliefs." *Id.*

The principle that courts are prohibited from assessing the validity of faith is echoed in the court's statements that individuals cannot be required to show that their beliefs are conventional or socially acceptable, *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972), or that they chose those beliefs by a rational process that is "acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

Adherents who "subject their reason to the demands of faith," D. Kelley, *Deprogramming and Religious Liberty*, 4 Civ. Lib. Rev. 23, 30 (July-Aug. 1977), and demonstrate the depth of their commitment by insisting upon their beliefs as "ultimate concerns," (*see* Tillich, *The Shaking of the Foundations*, 57 (1948), quoted in *United States v. Seeger*, 380 U.S. 163 (1965), should not find the intensity of their faith used as evidence of mind control or undue influence. "Otherwise the fact of adherence to a particular faith could itself become evidence of mind control, and the only way to show control over one's mind would be to renounce one's religion." Comment, *"Mind Control" or Intensity of Faith: The Constitutional Protection of Religious Beliefs*, 13 Harv. C. R. - C. L. L. Rev. 751, 795 (1978). *See also* Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. Cal. L. Rev. 1277, 1307-1309 (1983). Only by assessing the validity of the religious faith of the pastor and Mrs. Dovydenas could a court purport to what

religious influence is or is not due. Such an assessment, however, is constitutionally impermissible.

Just as the Constitution prohibits the courts from assessing the validity of faith, so too does it preclude the courts from determining whether the bases of Mrs. Dovydenas' decision to make her gifts to The Bible Speaks and of the pastor's solicitation of those gifts were religious or not. In *Thomas*, the Court stated:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, ... However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

450 U.S. at 714.

In *Thomas* the Court further indicated that in this "sensitive area" the Court does not have the competence to decide religious matters. *Id.* at 716. The Court has also stated that the "prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977). To the extent that litigants in this case may be presenting to the court conflicting testimony over what has religious meaning, civil courts are prohibited from resolving such a conflict. *Presbyterian Church v. Mary E.B. Hull Pres. Church*, 393 U.S. 440, 449 (1969).

This Court's explanation for the prohibition against judicial resolutions of what is religious as preventing government preference of one religion over another is quite germane to the case at bar:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. But . . . it is no business of courts to say what is a religious practice or activity for one group is not religion under the protection of the First Amendment. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Fowler v. State of Rhode Island, 345 U.S. 67, 69-70 (1953). More recently in *Lyng v. Northwest Indian Cemetery Protective Association*, 108 S.Ct. 1319, 1329-30 (1988), this Court held that the Constitution precludes the courts from holding "that some sincerely held religious beliefs and practices are not 'central' to certain religions." The outcome in *The Bible Speaks* case exemplifies the very outcome, described above by the Court, that the Constitution's prohibition against judicial determination of what is religious was meant to prevent—judicial bias against less conventional religious activity.

It is thus constitutionally inappropriate for a court to determine, in retrospect, both that Dovydenas' church contribution was not motivated by her religious belief and that the pastor's influence in en-

couraging such a contribution was likewise not valid religious expression.

Permitting liability to be imposed in this case inflicts upon religious organizations, including the 32 national Protestant and Eastern Orthodox religions that make up the National Council of Churches of Christ in the U.S.A., a chill on their absolute First Amendment rights to teach their doctrine to, and receive contributions from, their membership without fear that these basic exercises of freedom of religion will subject them to trial in a court of law, where the religious association will be forced to satisfy a group of non-members as to the "truthfulness," "prudence" or orthodoxy of its doctrine. The inevitable result of such a chill is ministerial self-censorship and prior restraint—concepts which are contrary to the protections granted by the First Amendment.

It is the "business" of a religious body to preach its gospel to all who will hear, to attract adherents, to make converts, to enlist them in whole-hearted obedience to its precepts, to warn them against temptations and evil influences, and to elicit the most generous support possible from them for the advancement of its work. In so doing, the religious body may well act in ways that could be characterized, in resentful retrospect, just as the petitioner's activities have been characterized by the respondent in this case.

A retrieved reformation, as in this case, with its intervention by euphemistically titled "exit counselors," its reconstruction of past events with the help of self-justifying anti-cult animus, and its demand for the return of contributions freely given out of sincerely-held commitment and since abandoned (contributions subsequently expended for the donor's

intended purpose) if enforceable by the courts, would represent a threat to the validity of adherence, the financial stability of organizations heavily dependent upon voluntary contributions, and the very meaning of "voluntary" itself.

No fraud or other criminal wrongdoing is even alleged in this case, only that the church and its leaders exercised "undue influence" on a susceptible but healthy, free, intelligent, alert, and self-determining adherent. Absent fraud or coercion and absent grave physical or mental disability on the part of the donor, the presumption should be that a person making a voluntary contribution to a religious or other organization has a right to make such a gift, and the organization to receive and use it, without subsequent repudiation of intent and recovery of the gift.

For a court to permit a responsible adult to repudiate, on the claim of "undue influence," a past religiously-based decision and to recover a sincerely-made contribution, would be to place in jeopardy the validity of all gifts to all religious organizations which might likewise be subsequently repudiated on similar unprecedented grounds. And when, as here, such restitution effectively demolishes the religious organization, the threat is not just ominous for religious liberty, but devastating.

CONCLUSION

The Bible Speaks' Petition for Writ of Certiorari should be granted for the reasons set forth above.

Dated: July 5, 1989 Respectfully submitted,

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No. 88-1977

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

In re: THE BIBLE SPEAKS,
Debtor

The Bible Speaks, Inc.
Petitioner,
v.
Elizabeth Dovydenas
Respondent

On Certiorari from the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE COALITION FOR RELIGIOUS FREEDOM IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an apparent conflict exists among the courts of appeal on the appropriate standard of review in cases involving mixed questions of law and fact relating to potential violations of religious freedom.

II. Whether the decision below clearly departs from this Court's teaching on the chilling effect of intense judicial scrutiny of protected activities of religious bodies.

III. Whether the lower courts need guidance concerning the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions after the "deprogramming" of members of religious bodies.

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STATEMENT OF INTEREST

The Coalition for Religious Freedom (CRF) is a non-profit, tax-exempt organization first organized in the District of Columbia in 1984 under the name, Committee for Religious Freedom. CRF is engaged in efforts to inform the public about the importance of religious freedom and to highlight instances of intrusion upon religious liberties. CRF is supported by contributions from the public, from businesses and other non-profit organizations. Its informational programs include publications, documentary films, educational conferences and a monthly newspaper, *The Religious Freedom Alert*. In addition to its general informational activities, CRF assists in the education of local communities and governmental officials on constitutional guarantees of religious liberty where a specific violation of first amendment liberties has been alleged. In numerous cases, CRF has appeared as amicus curiae by providing perspective on the significance of religious freedom in our society and by analyzing the legitimate interests of church and state. For example, CRF has filed amicus briefs in cases involving the dangerous practice of "deprogramming" of members of religious bodies, one of the issues presented in this case. CRF has a vital interest both in the freedom of religious conversion and in the concomitant need for delimitation of the role of secular courts in deciding tort suits generated by successive religious conversions.

Under Rule 36.1 of this Court, the amicus has obtained the consent of counsel for the parties to file this brief. The consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The petitioner in this case is a church in Lenox, Massachusetts, which in 1987 had approximately 1,300 members. With the aid of the contributions of its members, the church operated a large campus that included a nursery, a school for grades K-12 and the Stevens School of

the Bible. A. 9a. In late 1984 and early 1985 the respondent, a healthy, college-educated, heiress in her mid thirties, became a "born-again" member of the church, to which she made a series of large gifts that are the subject of this litigation. Alarmed at the size of these gifts, respondent's family tricked her into going to Minnesota, where she was subjected to an intensive, six day program of indoctrination conducted by paid professional "deprogrammers," who were assisted in this program by members of her family. A. 102 a. She was bombarded with lectures, discussions, and hours of video tape recordings designed by the deprogrammers to break the faith commitments of members of so-called "cults." The attack on various religious groups included the Church of Jesus Christ, Latter-Day Saints (Mormons), the Unification Church, the International Society for Krishna Consciousness and the followers of the Rev. Jim Jones. After this intensive "deprogramming," she was persuaded not only to leave the church, but to rescind all of her gifts to the church, alleging that these gifts were the product of undue influence on the part of the church and its spiritual leader, Pastor Carl H. Stevens.

Amicus urges this Court to protect the decision to leave a church, but not at the cost of fostering litigation by former members of a church over prior contributions to the church that were made freely and voluntarily, without any coercion or fraud on the part of the church.

This Court should grant the petition for three reasons. First, the decision below has created a conflict among the circuits on the appropriate standard of appellate review in cases presenting mixed questions of law and fact concerning violations of religious freedom. This Court should resolve that conflict.

Second, the decision below departs from this Court's sound teaching on the autonomy of religious bodies. This Court should correct that error to avoid a severe chilling effect on the ability of religious bodies to raise funds to continue their protected activities.

Third, the decision below ignores the danger to fragile religious freedoms when hostility to religious con-

version is given full sway in the dangerous phenomenon of "deprogramming" of members of religious bodies. The writ should issue to allow this Court to define the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions.

ARGUMENT

I. This Court should grant the writ to resolve the conflict among the courts of appeal on the appropriate standard of review in cases involving mixed questions of law and fact relating to potential violations of religious freedom.

This case arose from a bankruptcy petition in which the bankruptcy judge allowed the respondent to rescind all of her gifts to the church, resolving all controverted facts against the petitioner. *In re The Bible Speaks*, 73 B.R. 848 (Bank. D. Mass. 1987). A. 84a-134a. Both the district court, *In re The Bible Speaks*, 81 B.R. 750 (D. Mass. 1988), A. 61a-63a, and the court of appeals, *The Bible Speaks, Inc. v. Dovydenas*, 869 F. 2d 628 (1st Cir. 1989), A. 5a-8a, declined to review those facts on the standard of review mandated by this Court in *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 480 (1988).

In *Bose* this Court required that in order to protect vulnerable first amendment freedoms, appellate courts must undertake an independent review of the entire record to "decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by *clear and convincing proof*," *id.* at 510-511 (emphasis supplied), of some compelling governmental interest overriding the claim of a first amendment violation.[1]

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1 Professor Monaghan, who is of counsel for the petitioner, has offered a thoughtful commentary on the reasons for the *Bose* rule. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 254-259 (1985). Professor Tribe, who is of counsel for the respondent, is, of

Bose involved a claim of product disparagement. False and defamatory statements, themselves of no first amendment concern, were given heightened protection in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) because the risk of liability for mistakes would deter true speech as well as false, or would diminish the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. For those reasons a media defendant is entitled to prevail against a public official in a libel action unless the plaintiff can show "actual malice."

This Court has afforded special protection to media defendants because they are primary institutions whereby our cherished rights of freedom of expression and of communication are preserved. *Sullivan*, 376 U.S. at 266. Since churches are the primary institutions whereby freedom of religion is preserved, a similar logic has led some courts to recognize that religious communities are entitled to at least as much protection as commercial newspapers, by extending the *Sullivan* rule to church defendants in a libel action. *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363 (1987).

It was thus not much of a leap for the lower courts to have extended the *Bose* rule beyond its immediate factual context of cases implicating the *free speech* and *free press* provisions of the first amendment to cases implicating the *religion clauses* of the same amendment. When confronted with a free exercise claim, the Court of Appeals for the Third Circuit ruled to this effect in *Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue*, 743 F. 2d 148, 158, n. 9 (3d Cir. 1984); and see *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 542, n. 3 (3d Cir. 1984). When facing an establishment clause claim, the Tenth Circuit also ruled that the *Bose* rule applied. *Friedman v. Bd. of County Comm'rs*, 781 F.

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course, aware of Professor Monaghan's insightful work, and cites it favorably in his treatise. *American Constitutional Law* 872, n. 76 (1988).

2d 777, 779-780, n. 2 (10th Cir. 1985).

These cases are correct for the same reason that led this Court to reaffirm the principle of independent appellate review of first amendment claims in *Bose*, which did not represent a seismic shift in first amendment doctrine. The requirement of independent appellate review of the whole record in cases implicating first amendment values was asserted as long ago as *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927). That principle has been reaffirmed repeatedly by this Court, both in cases implicating religious freedom, *Wallace v. Jaffree*, 472 U.S. 38, 76 (1984) (O'Connor, J. concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *United States v. Seeger*, 380 U.S. 163, 185-188 (1965); and *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); and in cases implicating freedom of speech, *Jenkins v. Georgia*, 418 U.S. 153, 160-161 (1974); *Jacobellis v. Ohio*, 378 U.S. 184, 188-196 (1964); and *Sullivan, supra*, 376 U.S. at 271.

Far from detracting from the importance of the principle affirmed by *Bose* and ignored by the court below, the particular outcomes of these cases on the merits enhance the significance of the principle. For example, this Court invalidated the moment of silence and prayer statute in *Jaffree*, but that result is not inconsistent with the *Bose* rule; Justice Stevens wrote the opinion for the Court in both cases. This Court reversed the conviction for breach of the peace in *Cantwell*, but that result was not inconsistent with the result in *Fiske* reversing a conviction for criminal syndicalism; what was lacking in both *Cantwell* and *Fiske* was evidence to support the conviction upon an independent appellate review of the record. This Court refused over the objections of three concurring Justices in *Sullivan* to give absolute protection to defamatory speech, *Sullivan*, *supra*, 376 U.S. at 293 (Black, J., concurring); and at 297 (Goldberg, J., concurring). As *Jenkins* and *Jacobellis* illustrate, this Court has never extended the protection of the first amendment to obscenity; see also *Miller v. California*, 413 U.S. 15 (1973). But that has not kept this Court from recognizing the importance of prompt appellate review - along the lines in-

dicated in *Jenkins* and *Jacobellis* - of cases involving first amendment claims; see, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965).

By ignoring the importance of independent appellate review of the factual predicates for the characterization of issues in a first amendment case, the court of appeals erred for the very reasons offered by Professor Tribe in his comments on *Bose*:

> "*Bose* illustrates that, for all the twists libel doctrine has taken over the years, a majority of the Court still takes *New York Times* seriously -- not trusting, as it usually does, the lower courts to apply the Court's decisions faithfully, but requiring that libel decisions receive special appellate scrutiny. *Bose* recognizes that the law has indeed evolved and undoubtedly will continue to do so; but the principle underlying *New York Times* -- freedom to criticize on issues of public importance -- remains paramount. Perhaps it was even in recognition of how dramatically the law of libel has changed over the past two decades that the Court in *Bose* underscored its own duty and pledged its best efforts to maintain continued vigilance for first amendment values."

L. Tribe, *American Constitutional Law* 872 (1988).

Similarly, it is a fair implication from this Court's free exercise doctrine that only the *best* efforts of appellate judges will do in maintaining continued vigilance for the protection of religious freedom. Since *Sherbert v. Verner*, 374 U.S. 398 (1963) this Court has required that the government show both that its interest is paramount or compelling in character and that only uniform enforcement of a statute challenged by a free exercise claimant will suffice to effectuate that interest.[2] Neither of these

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2 See, e.g., *Frazee v. Illinois Department of Employment Security*, 109 S. Ct. 1514 (1989); *Lyng v. Northwest Indian Cemetery Ass'n*, 108 S. Ct. 1319 (1988); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981); *Wisconsin v. Yoder*, 460 U.S. 205, 220 (1972). Professor Tribe,

tests can be satisfied if appellate judges are not under an on-going duty to review the entire record in free exercise cases to determine whether a truly compelling interest is factually grounded. The alternative is that the government would win every free exercise case merely by asserting that its interest is paramount. Similarly, the less restrictive means test demands serious scrutiny of the entire record to probe whether the government's interest may adequately be served by an alternative that is factually less restrictive of religious freedom.

In this case, of course, it is not the government that is asserting its own interests, but a private party using the federal courts to effectuate a rescission of voluntary gifts to a church made while she was still a member of that church. Precisely because common law adjudication of tort claims against religious bodies does not proceed upon the predicate of a carefully reasoned legislative judgment that a religious interest must be overborne by a countervaling governmental interest, it is all the more imperative that the courts do not allow private parties to prevail easily when their lawsuits implicate first amendment values. One of the clearest ways of avoiding the erosion of first amendment freedoms by private litigants is to raise the burden of proof for the plaintiff, as this Court did in *Sullivan* and in *Bose.*

The court of appeals attempted to account for its transparent departure from *Bose* by suggesting that"the first amendment is not implicated in this case." A. 8a. Despite the obviously religious character of the communications between Pastor Stevens, court of appeals apparently concluded that these privileged communications did not implicate "beliefs rooted in religion." A. 44a, citing *Thomas v. Review Bd., supra.*[3] This remarkable conclu-

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of course, is committed in the abstract to the importance of those standards, see L. Tribe, *supra*, at 1251-1275. This case tests whether the courts will be bound to follow a practical means of giving special protection to first amendment values.

3 The court of appeals relied on dictum in *Cantwell, supra*, 310 U.S. at 306, to the effect that persons may not with impunity commit

sion, let alone the distortions of fact in this record,[4] is sufficient illustration of the soundness of the rule adopted in *Bose* and the error of the court of appeals in declining to follow that rule. It seems apparent to amicus that the

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frauds on the public under the cloak of religion. It ignored the careful limitation on that dictum in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (rejecting judicial authority to review claims of "arbitrariness" in compliance with church law, and leaving open the question "whether or not there is room for *'marginal court review'* under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes") (emphasis supplied).

4 For purposes of this argument, amicus does not contest the credibility determinations of the bankruptcy court. But a dispassionate, objective reading of the record -- along the lines indicated in *Bose* -- renders unsupportable the two crucial assertions that pass for "findings" in the district court. First, the district court concluded that Pastor Stevens' religious statements did not reflect his beliefs or the tenets of the church. A. 71a-73a. Never mind that this sort of inquiry is itself problematical, if not precluded by the teaching of this Court in *Watson v. Jones*, 80 U.S. 679 (1871), and its progeny. Focusing on this record, that conclusion is directly and repeatedly contradicted by relevant evidence that was ignored, not discredited, by the court (see, e.g., R.A. 134-135, 1694-1696, 1943-1944, 1954, 1957, 3070-3071). Second, the district court sustained the "finding" of the bankruptcy judge that the influence of Pastor Stevens over the respondent was achieved by means of nonreligious statement. A. 78a. Once again, this conclusion is at odds with the clear weight of the evidence -- including the testimony of the respondent -- when viewed dispassionately in the spirit of *Bose* (see, e.g., R.A. 99, 102, 113, 208-210, 1094, 1948-1949, 1952-1953). Although the court of appeals reached the conclusion that the "findings and rulings rest solely on secular statements and actions," A. 45a, it acknowledged that the gifts it ordered to be rescinded "might have had their seeds in the religious beliefs of [the respondent]." A. 46a. Even the bankruptcy judge noted that its "conclusion that a minister of a church, in speaking of God and the Devil, was not imparting the beliefs and practices of his church would in some circumstances be a determination that is frought [sic] with peril." A. 123a.

court below reached the astonishing conclusion that no first amendment claim is presented in this case because of its very failure to undertake independent review of the record. Only in this way may one ignore the severe impact on religious bodies that manifestly flows from a rule that the mere invocation of an unstructured tort like "undue influence" suffices to rescind charitable contributions to a religious body, see Part II, *infra*. Because the decision below is disharmonious with *Presbyterian & Reformed Publishing Co., supra, Bender, supra,* and *Friedman, supra,* this case represents an apparent conflict among the circuits requiring the resolution of this court.

II. This Court should grant the writ because the decision below clearly departs from this Court's teaching on the chilling effect of intense judicial scrutiny of protected activities of religious bodies.

Another reason why this Court should grant the writ is that the decision below departs from this Court's sound teaching on the autonomy of religious bodies. This Court should correct that error to avoid a severe chilling effect on the ability of religious bodies to raise funds to continue their protected activities. This Court has recognized from time to time the practical necessity that religious organizations, like other non-profit organizations, must solicit funds in order to carry on their protected activities.[5]

In *Sullivan, supra*, concern over the risk of chilling the first amendment rights of freedom of speech and of the press prompted this Court to set constitutional limits to recovery of damages under the rather well defined tort of libel.[6] As Justice Brennan noted in *Sullivan*, the risk of

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5 See, e.g., *Heffron v. ISKCON*, 452 U.S. 640, 647 (1981); *Larson v. Valente*, 456 U.S. 228 (1982); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

6 The tort of undue influence is far less developed than the tort of libel. Hence religious bodies that become vulnerable to a chilling effect under the tort of undue influence are no less worthy of judicial

incurring liability for damages from libel actions will cause speakers to "steer far wider of the unlawful zone," 376 U.S. at 277-79, quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1957).[7]

Here the chilling effect on first amendment freedoms is no less severe. On the contrary, this case forebodes a devastating impact on all religious organizations. Unless reversed by this Court, the decision below would permit persons hostile to a religious faith to take back all their previous donations to the church, even though made with

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protection than the media defendants protected in *Sullivan* against unrestrained damages under the tort of libel. The bankruptcy court relied on *General Council on Finance and Administration, United Methodist Church v. Superior Court*, 439 U.S. 1369 (1978) for its view that the *Watson* line of cases is inapplicable to this case. A. 127a. Justice Rehnquist in his capacity as Circuit Justice denied the stay sought by a large religious denomination in an interlocutory appeal, and wrote dicta that appears to allow civil litigation against a religious body accused of fraud. But it is a complete misunderstanding of the record in that case to suggest, as the bankruptcy court did, that there was no dispute "concerning the interpretation or propriety of the Church's doctrines or practices." To the contrary, that dispute was at the very heart of the church's protracted litigation. See E. Gaffney and P. Sorensen, *Ascending Liability in Religious and Other Nonprofit Organizations* 6-12, 42-48 (1984). In any event, the distinction between fraud and undue influence, as well as the fact that the Methodist case came before this Court in a preliminary phase of the litigation without a fully developed record, adequately distinguish that case from this one.

7 The concern that newspaper editors would censor themselves even led the concurring Justices in *Sullivan* to advocate an absolute rule protecting the press against damages for the libel of a public official. 376 U.S. at 293 (Black, J., concurring); and at 297 (Goldberg, J., concurring). See also *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (tort of intentional infliction of emotional distress confined to leave room for parody of public figures); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (even private figure must bear burden of proving that defamatory speech is false, lest true speech be deterred).

the kind of maturity of judgment reflected in this record, by an intelligent, college-educated, 34-year-old adult who was of sound mental and physical health and who was living at home with her husband and children at the time of the donations at issue in this case.

The very fact that the court of appeals picked and chose among the respondent's gifts to the church, allowing the gift of $ 1 million to stand and rescinding the larger gift of $ 5 million planned by the same adult three months later and executed six months later, is itself a reason calling for plenary review of this case.[8]

One of the clearest statements of the chilling effect of a rule like that announced by the court of appeals was written by one of the attorneys for the respondent, Professor Tribe:

> "Once it is conceded that first amendment values are unacceptably compromised when civil courts undertake to settle religious issues, it becomes clear that allowing a legal determination about property or some other secular matter to turn on a court's answer to a religious question is a path fraught with peril: the path is one along which *unsatisfied former believers could drag the civil courts into the theological thicket by the simple expedient of suing for a refund of their prior donations to a religious organization....*
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> The existence of dissidents is a pervasive fact

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8 For example, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), Justice Brennan noted that the first amendment prohibits courts from probing deeply into matters of church polity and organization. *Id.* at 698, 713, 721; and see *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring) (warning of general danger of excessive entanglement by extensive judicial inquiry into the financial structures of a religious body); and *Maryland & Virginia Eldership v. Church of God at Sharpsburg*, 397 U.S. 367, 369 (1970) (Brennan, J., concurring) (warning of particular danger of probing "into the allocation of power within a church so as to decide where religious law placed control over the use of church property").

> of religious life; their role within religious organizations can be the healthy one of spurring continuing introspection and re-examination of doctrine. But it is not hard to imagine what would occur if each potential dissenter were told: contributing to a religious organization -- your own or indeed that of a group you reject -- will give you a judicial platform from which to air your religious differences with others and potentially win a favorable verdict; all you need do in order to overcome the normal bar to civil adjudication of ecclesiastical matters is sue for a refund! Not only would such an invitation declare *open season on churches and their followers*; it could at the same time make at least some religious groups resist the very attempt to solicit donations, while inducing others -- those too desperate for resources to refrain from financial appeals -- to rigidify their doctrines and freeze or at least conceal their own evolution for fear that doctrinal change, ordinarily immune from censorship, could trigger refund-seeking litigation. It is in part for reasons such as these that the first amendment has been construed to mean that religious questions remain non-justiciable even when they do not reach civil courts independently but instead form preliminary or ancillary issues in an otherwise justiciable dispute."

L. Tribe, *American Constitutional Law* 1235-1236 (1988) (emphasis supplied).

This Court has recently clarified that a charitable contribution is not deductible for federal income tax purposes if the donor receives a measurable, tangible benefit in exchange for the gift. *Hernandez v. Commissioner of Internal Revenue*, 57 U.S.L.W. 4593 (1989). In *Hernandez*, this Court did not, in Professor Tribe's words, "declare open season on churches" by raising the prospect that anyone who changes his or her mind about a religious conversion and leaves a church may seek a court order for a refund of prior contributions to the church.

The lower courts were apparently unaware of the

limit that the first amendment places on judicial power to scrutinize the internal financial affairs of religious bodies. At any rate they do not mention *Watson* and its progeny. The writ should issue to reaffirm the principle of avoiding excessive entanglement and to avert widespread probing of internal religious matters of the sort illustrated by this record.

III. This Court should grant the writ to define the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions after the "deprogramming" of members of religious bodies.

This Court recently declined to review a case presenting the question whether a secular court may inquire into alleged "mind control" by a religious body, absent any evidence of force or threat of force. *Holy Spirit Ass'n v. Molko*, cert. denied, No. 88-1600, 109 S. Ct. 2210 (1989). *Molko* is distinguishable from this case for two reasons. First, the tort of fraud alleged in *Molko* is more difficult to prove than the vague, open-ended tort of undue influence alleged here. If this case sets the rule, churches will be in a much more vulnerable position than they are under *Molko*. Second, *Molko* came before this Court on a motion for summary judgment; this case is presented on a full trial record.

For these two reasons, this case is a better vehicle for this Court to address a problem that both cases have in common, the dangerous phenomenon of kidnapping and "deprogramming" of members of religious bodies by persons -- often family members -- who are hostile to the group that the "deprogrammed" person has joined. Left unchecked by this Court, this dangerous tendency may do serious damage to the core religious freedom of conversion, implicitly protected by this Court as recently as *Hobbie*, *supra*.

In this case, on the pretext that a birthday party was planned for her father, respondent travelled alone from Lenox, Massachusetts, to a specially rented house in Min-

nesota, where she was subjected to six days of faith-breaking indoctrination conducted by paid professionals, together with members of her family. A. 102 a. She was bombarded with lectures, discussions, and hours of video tape recording about various purported "cults," including the Mormon Church, the Unification Church, the International Society for Krishna Consciousness and the followers of the Rev. Jim Jones. *Id.*; Joint Appendix filed with Court of Appeals, vol. 1, pp. 571-72; *id.* vol. 2, p. 1223.

The present case and *Molko* are but two cases in which former members of the religious groups have sued the groups, claiming psychological injury or seeking the return of money contributed on fraud-related theories.[9] The surprising feature shared by the respondent in this case and by virtually all the plaintiffs in the suits against new or controversial religions is that those who pursue lawsuits abandoned their affiliation with their former religious groups under coercive "deprogramming," euphemistically called "exit counseling" by the court of appeals and the bankruptcy court. A. 33a, 102a-103a. That the myriad former devotees of minority religions who left without the midwifery of deprogrammers seem far less inclined to sue indicates that deprogramming, for all its pseudo-psychological jargon, is a battle between different faiths for the minds of believers. The fervor shared by many who have undergone the deprogramming process, however it turns out, mirrors the religious passion of those who participate in it.

The deprogramming phenomenon began in San Diego in 1971 with Ted Patrick's almost inadvertently

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9 See, e.g., *George v. International Society for Krishna Consciousness*, No. 4th Civ. G000399 (Cal. App.) (multi-million dollar damages for emotional distress); *Murphy v. ISKCON of New England*, NO. A.C. 88-P-1209 (Mass. App.) (same); *Christofferson v. Church of Scientology*, 644 P. 2d 577 (Ore. App. 1982) (refund of moneys paid for religious services sought on grounds of fraud and undue influence); *Wollersheim v. Church of Scientology*, No. Civ. B 023193 (Cal. App.) (same).

talking to a friend's son out of his affiliation with the Children of God. Within a few years, more than a thousand persons disappeared from American religious communities for deprogramming.[10] Patrick usually resorted to forcible kidnapping, as he admitted in his own account of his exploits. T. Patrick, *Let Our Children Go* 76-77 (1976). Despite the illegal form of his initial intervention, police leniency and jury sympathy allowed Patrick forcibly to seize the members of religious groups.[11]

Ted Patrick's adventures were followed, almost immediately, by the formation of a number of anti-cult, "parent power" groups, beginning in San Diego. Soon, deprogrammers-by-force were joined by a growing retinue of lawyers and frequently self-anointed mental heath professionals, and a network of "safe houses" was established. Unbound, Inc., the deprogramming center at which respondent received indoctrination after leaving Minnesota, is a direct outgrowth of this aspect of the deprogramming phenomenon. See *Daily Iowan*, Oct. 17, 1988; see also Boothby, *Government as an Instrument of Retribution for Private Resentments*, in *Government Intervention in Religious Affairs* 79, 83-94 (D. Kelley ed. 1986); A. Shupe and D. Bromley, *The New Vigilantes* 87-90

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10 See B. Sipchen, *The Cult Wars - Ten Years After Jonestown, Battle Intensifies Over Influence of "Alternative" Religions*," Los Angeles Times, Nov. 17, 1988 § 5, at 1; Kilbourne and Richardson, *Cultaphobia*, 61 *Thought* 258 (1986); Robbins, *Cults, Brainwashing and Counter-subversion*, 446 The Annals 78 (1979).

11 "[Patrick] sometimes notified police in advance about his activities; law enforcement officers looked the other way when an abduction was taking place, claiming it was, after all, a family affair." *Liberty*, March/April 1975, at 11. "Numerous instances have been recorded in which police officers were present at the time of the forcible abductions and allowed parents and deprogrammers to forcibly remove U[nification] M[ovement] members from the scene.... [D]eprogrammers being prosecuted for false imprisonment were able to request jury trials and rely on the emotional impact of parental [and psychiatric] testimony ... to sway enough jurors to prevent conviction." A. Shupe and D. Bromley, *The New Vigilantes* 134 (1980).

(1980); J. Biermans, *The Odyssey of New Religion Today* 113-17 (1988).

An increasing involvement by psychiatrists and social workers gave apparent legitimacy to deprogramming, and the involvement of lawyers led to the development of non-violent means of commencing and conducting deprogrammings. Michael Trauscht, a Tucson psychotherapist, and Wayne Howard, an Arizona attorney, through their Freedom of Thought Foundation, apparently devised and undoubtedly marketed the idea of gaining control of members of religious groups though court-ordered temporary conservator-ships. Significantly, a conservatorship was eventually sought against the respondent, although the court below found it to have been obtained by "consent" after respondent first spent one week in Minnesota and "a few more weeks" in the Unbound, Inc., center in Iowa. A. 103a.

The essential religious nature of the deprogramming system is evident from the behavior expected of those who have been deprogrammed. Lengthy "rehabilitation"--for which families were charged substantial sums--frequently included the requirement of assisting without pay in other deprogrammings. As noted above, rehabilitated apostates were a ready source--perhaps the only source--of plaintiffs to file suit against their former churches. They gave public speeches and wrote books, exhorting that others needed to be saved from the demonic control of the "cult." Thus, for many it was both a new career and a new true "religion."[12]

After several legal challenges to the use of involuntary conservatorships, see, e.g., *Katz v. Superior Court*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977), this device has diminished. Perhaps this has been because

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12 See, e.g., Edwards, *Crazy for God* (1979); Underwood and Underwood, *Hostage to Heaven* (1979); Wood and Vitek, *Moonstruck: A Memoir of My Life in a Cult* (1979); Freed, *Moonwebs: Journey into the Mind of a Cult* (1980); Durham, *Life Among the Moonies: Three Years in the Unification Church* (1981); Kemperman, *Lord of the Second Advent* (1981); Swatland and Swatland, *Escape from the Moonies* (1982).

when Professor Tribe speaks, courts listen.[13] But as this record suggests, neither deprogrammings by trick, A. 32a ("the family's ruse worked"), nor - in more extreme cases - forcible kidnappings have been eradicated.[14] Indeed, to a considerable extent, when deprogrammings are not accomplished by illegal means or, as the *Katz* court put it, the "misuse of the state insanity-guardianship or conservatorship statutes," *id.*, they should be the subject of sociological, religious and historical --but not judicial-- interest. The right of the new religions to win converts is necessarily counterbalanced by the right of others to do the same.

The danger, squarely presented by this case, is that the essentially religious nature of the conversion process called deprogramming will be misunderstood by trial judges and juries that are puzzled by new religious movements and skeptical of religious faiths that require intense and absolute commitment. Although the methods of deprogrammers have changed over the years, the underlying nature of the process is no different.

In the heyday of involuntary conservatorships against church members, many trial judges were willing to enter orders ex parte based on the affidavits of psychotherapists who had not interviewed or treated the

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13 According to the conservatorship theory advanced by the trial court in *Katz*, "the child is the child even though a parent may be 90 and the child 60." Professor Tribe agrees that this ruling "was properly reversed" because it "stretched the umbilical cord to the grave" and elevated the rights of the family over those of the church and the individual religious adherents. Tribe cites his colleague at the Harvard Divinity School, Professor Harvey Cox, for the view that "according to the Gospel of Mark, Jesus was a candidate for 'deprogramming,' since his own family thought he was berserk and his religious leaders said he was possessed by the devil." L. Tribe, *American Constitutional Law* 1300-1301 (1988).

14 Professor Tribe has also noted that where deprogrammers act without legal authorization, "courts are increasingly willing to hold them liable for false imprisonment and other torts, as well as for civil rights claims." *American Constitutional Law* 1301, n. 30.

prospective conservatee. See *Katz v. Superior Court*, *supra*. Because the religious dispute was cast in the guise of a familiar and superficially secular proceeding, a conservatorship, the lower courts need guidance about the extent to which the religion clauses nevertheless limit judicial intervention in disputes between a church and a former member. When, as in the present case and similar suits, disputes arising out of what may most accurately be described as a conversion to a religion followed by a conversion away from that religion have been brought to civil courts in actions sounding in tort, the lower courts also need guidance about their paramount duty to protect religious liberty. The writ should issue to allow this Court to define the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari.

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